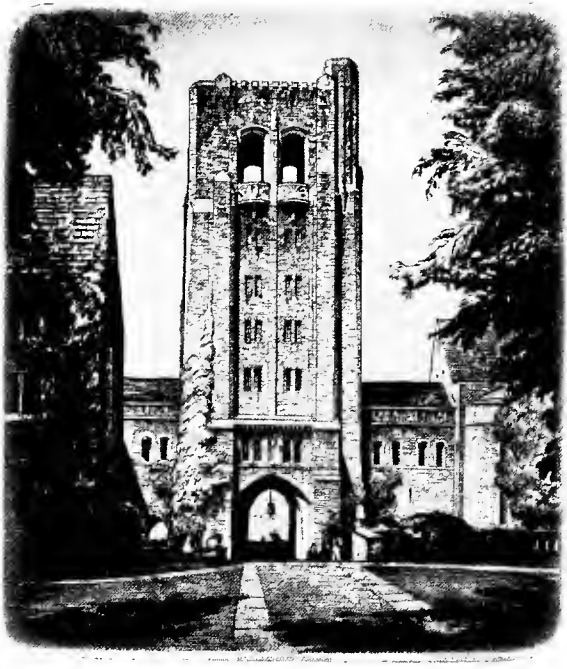
THE RIGHT TO
AND
THE CAUSE FOR
ACTION



THE RIGHT TO AND THE CAUSE FOR ACTION

BOTH CIVIL AND CRIMINAL

AT LAW, IN EQUITY, AND ADMIRALTY
UNDER THE COMMON LAW
AND
UNDER THE CODES

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Dedication.

TO MY FRIEND, THE JURIST WHO NOW
SO ABLY FILLS THE OFFICE OF
UNITED STATES DISTRICT JUDGE
FOR THE SOUTHERN DISTRICT
OF OHIO, THE HONORABLE
ALBERT C. THOMPSON,
IN TOKEN OF PERSONAL
REGARD, AND APPRECIATION
OF HIS JURIDICAL TALENTS,
THIS VOLUME IS DEDICATED BY THE
: : : : AUTHOR. : : : :

PREFATORY.

"The life of the law," says Holmes, "has been experience." [1] This statement applies with peculiar force to that division of the law which we term Remedial. "The time has long gone by," say Pollock and Maitland, "when English lawyers were tempted to speak as though their scheme of forms of action had been invented in one piece by some all-wise legislator. It grew up little by little." [2] At one period of this growth such forms became so numerous as to count up into the hundreds, and "there were in common use some thirty or forty actions, between which there were large differences." [3] But at that time, as very largely ever since, the question of one's legal *right* merged itself into a problem of legal *redress,* in case the alleged right was infringed. As Lord Holt declared, "it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal." [4] One consequence of this general principle was that in the Common Law, what we now distinguish as primary rights were

enlarged by an expansion to meet new cases, of the forms of redress—the former, indeed, grew out of the latter, when they passed into the domain of legal rights. Only since the evolution was practically complete, and the effect of written law in widening alike the field of legal right and remedy very great, has the analysis by which the line of cleavage between substantive and adjective law, with the different classes of rights corresponding thereto, been made generally familiar. Yet such a demarcation evidently runs through the structure of civil government which, in one aspect, is simply civil law creating legal rights and also giving the means of remedy for the wrong done by their violation. Hence, in this view it is apparent that remedial rights, though correctly classed as secondary, rest upon the same foundation which sustains primary rights. None the less, it is to be kept in mind that the latter have their ground in what we distinguish as substantive law, while all remedial rights arise from the adjective law.

The judicial power is that by which the law of remedy is made efficacious, and courts of judicature are its chief agencies to this end. Before them, however, redress for wrongs becomes primarily a question of procedure. A chief feature in that is to show a cause for, and right to, judi-

cial action. The former is fundamental to relief in all suits, civil or criminal. Yet in no book, nor in the cases touching the matter, has the problem of what constitutes a *cause* for action been fully analyzed and worked out; and until shown by myself the distinction between that and a *right* to action never was clearly stated, or its basis perceived. Mr. Pomeroy failed to see it, and so confused these entirely different things. He seems to have overlooked the fact (1) that the substantive law is a condition merely to the existence of a legal wrong, and (2) that upon the commission of the *delict,* from the adjective law, a right to remedy springs.

More than twelve years ago, as judge in the Washington County, Ohio, Court of Common Pleas, I heard and decided a case, the opinion in which was published.[5] The nature of the controversy compelled me to determine the *locus* of the cause for action which was shown by the facts alleged, and this led to an investigation of what, in personal actions, constitutes the cause. It is pardonable here, I trust, to transcribe a part of the opinion, inasmuch as at some points it broke wholly new ground. The following, therefore, is quoted:

What has been termed the substantive law determines the legal relations of persons within

the sphere of its operation, and by general rules, which become standards of civil conduct, defines their respective rights and obligations. As, however, there can be no real legal right, without a means of redress if it be violated, alongside of the great body of substantive law, lies what we call the law of remedy—"the means whereby rights and duties are enforced." * * The ordinary judicial means of redressing wrongs, is by an action. This indeed is defined as a "judicial proceeding for the prevention or redress of a wrong." Between the substantive law and the law of remedy there is this important distinction: the former *proprio vigore* operates upon all persons within its field, while the latter may truly be said to operate only upon *occasion*—when something is threatened or has been done in violation of a legal right. * * When a legal right has been violated, and so a wrong done by one to the injury of another, the relations of both to the law of remedy are changed in vital particulars. Before that neither could invoke its aid, nor be compelled by its process. In potential sense only could either be said to have a right under, or by virtue of it. But upon the commission of the wrong, all this is changed. Then the party injured can do what before was impossible—go into a court of competent jurisdiction, and, for purposes of redress, put the law of remedy in motion against the wrongdoer. The conjunction of the wrong with the law of remedy gave a new right to the party injured—a right of action. After showing that the law of remedy has no part in creating a wrong, it further was said: On the other hand, the right of

action is wholly independent of the substantive law, except as it furnishes a rule by which to determine when a wrong has been done. * * Obviously, the substantive law can not enter into the cause of action, for the reasons which exclude it as an element in a right of action. So, neither the substantive law nor that of remedy, nor both, *per se* give a *right* of action to anyone. Only when some *act* has been done which violates a *duty* under the former, and so makes a *wrong,* in legal sense, can there be any *actual* right of action. But the wrong being done, from the law of remedy the right *ipso facto* arises. Is it not, then, perfectly clear that the *wrong,* and it alone, is the *cause* of action?

The application of the doctrines thus set out was limited to civil actions in *personam*—their scope had not then been fully seen. Moreover, the statement of them was at some points a little obscure, if not incomplete. Fuller investigation, and especially an examination of the adjudged cases, such as had not before been made, has led to their more elaborate presentation and truer expression in this work. Beyond that, the law regarding the *locus* of the cause for action is briefly stated, and shown to be simplified by this conception of what constitutes the "cause." Thus considered, also, its relation to the law of parties and of pleading, as being the ground of their logical evolution,

is concisely outlined. Other matters of importance fall within the general discussion—a true definition of the "action," an accurate view of what a legal wrong consists in, and of its relation to primary rights being examples.

Convinced of the essential soundness of the conclusions reached, on principle as well as authority, and also that their acceptance will clear away confusion now existing respecting actions, the right to, and cause for, them, by putting these matters in their true light and relations, my first work in legal authorship, imperfect as it may be found, is submitted to the profession in hope that its substance at least will be regarded as of real value.

HIRAM L. SIBLEY.

MARIETTA, OHIO.

[1] Common Law, 1.
[2] 2 Hist. of Eng. Law, 559.
[3] 2 Pollock and M., 564.
[4] Ashby v. White, 2 Smith's L. C.
[5] 22 Ohio Law Bull., 63; 10 Ohio Dec. (reprint), 539. This is the only case referred to on the right to action in the American Digest now publishing (Vol. I., 1095). Under the title Action, it several times is cited, and passages extracted from it, in the Cyclopedia of Law and Procedure.

THE CAUSE FOR ACTION—CIVIL AND CRIMINAL.

PART FIRST.

CHAPTER I.

LEGAL RIGHTS.

§ 1. **Body of work on cause for action. Preliminary to this, clear conception of legal rights, wrongs, and some things in law of remedy, important. Root of these in nature and structure of government itself.**

The body of this work is devoted to an investigation of the cause for action, civil and criminal. Its elucidation is based on settled legal principles, as well as the adjudged cases. Preliminary to the direct consideration of the subject, however, it is deemed important to get a clear and definite conception of legal rights and legal wrongs, with a view also of certain features in the law of remedy, as a fundamental part of our system of jurisprudence. To this end, it has

seemed necessary that one start at the root of these things, in the nature and structure of civil government itself. Only in that way could an examination of the matter in hand be made complete on the method by which it should proceed.

§ 2. Civil government created by the State. Takes form and embodies forces of law. This the formulated, armed opinion of ruling body.

Civil government, the greatest of corporate entities, is a creation by that sovereign power in a definite country and body of people, which political science calls the "State." [1] From its nature, government takes the form, and embodies in itself the concrete forces of law; which "is, in fact, formulated and armed public opinion, or the opinion of the ruling body." [2] Or, as stated by the late President Woolsey, "the State acts by authority; that is, by law and constitution; but it is essential that it should have might, which consists of armed men." [3]

[1] Burgess, Polit. Science and Const. Law, 66, 74; Blunschli, Theory of State, 23, 326; Willoughby, Nature of State, 141.

[2] Holland's Elements Jurisp., 84.

[3] Political Science, §82. The late Dr. John Fiske, in his volume on civil government in the United States, says it consists in "the directing or managing of such affairs as concern all people alike—as, for example the punishment of criminals, the enforcement of contracts, the defence against foreign enemies, the maintenance of roads and bridges, and so on." So far as it goes, this is true. But it also should

be observed that while government is the great means for preserving order, and in directing affairs in general concern, it is emphatically a *compelling power.* The point to mark is, that in final analysis *government is force*—an instrument which operates by compulsion, actual or potential. Washington understood this profoundly. Hence, when urged to try to "influence" those engaged in the Shay Rebellion, to obey the laws, he wrote: "I know not where that influence is to be found, or, if attainable, that it would be a proper remedy for the disorders. *Influence is not government.*" A few words as to the legitimate scope of governmental authority may, perhaps, not inappropriately be added. Whatever is requisite to preserve social order, which includes its own defence and preservation, the government of course may do. But beyond this, are many things of common interest and general necessity which it can manage to greater advantage than could private persons. Here the principle of limitation upon the extent of its powers comes into view. *Save what is necessary for the conservation of order, and those things of public need which government is the more efficient agent in doing, all the movements of society, social, industrial, or religious, belong to the free, voluntary action of the individual.* Since the text and this note were written, Andrews' American Law has come into my hands. Its luminous discussion of the principles of government—its origin, structure and peculiar elements, in this country, can not be passed, by a student of the subject, without loss. "Government," this work says, "is that organization to which the exercise of political *powers* is entrusted. It is the political system created by the agreement of the people, evidenced by the constitution or fundamental law." (§ 123.)

§ 3. Within the United States, law embodied in Civil Constitutions, legislation under them, and Common Law, which are the sources of legal rights.

Within the United States, where stable government over a wide extent of territory and a great body of people has reached its most complete formal, as well as popular development, the law, which is its authoritative expression, takes on three quite distinct features. These are shown (1) in those fundamental rules directly declared by the Power which constitutes the State, through whose immediate action Civil Constitutions are made; (2) the legislative enactments of the governments thereby instituted; and (3) those legal principles and doctrines that are recognized and enforced as Common Law.[1] These constitute the sources from whence we derive all our legal, as distinguished from moral or social rights; for "that which gives validity to a legal right is, in every case, the force which is lent to it by the State." [2]

[1] Willoughby, Nat. of State, 142.
[2] Holland's Elements Jurisp., 77.

§ 4. This mass of laws divisible into two parts. First is substantive law, which creates rights, and determines the legal relations of those within its field.

By virtue of inherent differences, this entire mass of laws is divisible into two complemental parts. "Law," says Mr. Holland, "de-

fines the rights which it will aid. * * So far as it defines, thereby creating, it is substantive law." [1] This, then, is the division which determines the legal relations of those within the field of its operation, by rules which become standards of civil conduct.

[1] Elements of Jurisp., 84; Bishop on Stat. Crimes, § 175. "Both in the nature of things and in adjudication, there is," says Mr. B., "a distinction between what pertains to the right and what to the remedy. And our entire law is separable into these two classes."

§ 5. Next is adjective law, or procedure, made necessary as a means of redressing legal wrongs.

Mr. Holland further states, that so far as the law "provides a method of aiding and protecting, it is adjective law, or procedure." [1] This constitutes the second of the two parts of the whole body of laws. Its necessity arises from the fact that there can be no real legal right without a means of redress for the wrong done by its violation—a cardinal principle in our system.[2]

[1] Elements Jurisp., 84.

[2] Lord Holt said that "it is vain to imagine a right without a remedy; for want of right and want of remedy are reciprocal." Ashby v. White, 1 Smith's L. C., 356; 1 Eng. Rul. Cas., 521; Mackeldy's Roman Law, Sec. 13. The latter work says: "The idea of a perfect right presumes that he on whom it is conferred must be enabled to maintain it by force. But this can not be exercised by himself * * The compulsion can

be exercised only by the supreme power of the state, which has been constituted for the purpose of maintaining the rights and liberties of one against the violations and attacks of another." See also Bacon's Ab., Actions in Gen. (B); Percy vs. Powers, 51 N. J. L., 432; 14 Am. St., 693; Broom's Com. Law, 86; Andrew's Am. Law, 1027; Ewell v. Daggs, 108 U. S., 149.

§ 6. Corresponding to these divisions of law, two classes of rights—primary and remedial. Both derived from law alone. Second class, for purpose of vindicating those of first class. This done by their giving one injured a title to redress.

Corresponding to these grand divisions of the law, in its entirety, are two classes of rights. The first is termed primary or antecedent, and the other, secondary or remedial. They all have a like basis and character in the fact that both classes of rights are purely legal, by which is meant that they are derived from the law alone. They differ, however, and become distinct from the circumstance that rights of the second class exist solely for the purpose of vindicating, and so upholding, those of the first class. This they accomplish by giving to injured parties a title to redress for wrongs done them by the actual, and in some cases merely threatened, invasion of a primary right.

§ 7. Both primary and remedial rights coexist in those unlawfully injured. But while substantive law ever is operative, the adjective law is called into operation only when a wrong is committed; then only for redress of injured rights.

As Mr. Holland observes, "if all went smoothly, antecedent or primary rights," such as the substantive law creates, "would alone exist"; for, as he adds, "remedial or sanctioning rights are merely part of the machinery provided by the State for the redress of injury done to antecedent rights."[1] But inasmuch as in the legal, no less than moral, realm, offenses continually come, with regard to those thereby injured, both branches are operative, and in them the two classes of rights coexist. At this point, however, a striking, and for some purposes most essential, difference between substantive and adjective law emerges. The former "is operative at all times and upon all persons; it operates *proprio vigore,* both out of court and in court."[2] The latter, on the other hand, never is generally operative. *Only when something has been done or omitted in violation of legal duty—when a wrong is committed, in other words—is it, or can it legitimately be, called into operation;* and then clearly in none but instances where the rights of injured parties are to be redressed.

[1] Elements of Jurisp., 139.
[2] Phillips on Code Pl., § 33.

CHAPTER II.

LEGAL WRONGS.

§ 8. A wrong is the violation of a legal right. Some threats entitle one to preventive relief, and in certain cases, refusal to pay for unrequested services, gives a right of recovery therefor.

"A legal wrong," says Prof. Robinson, in his very able work on American Jurisprudence, "is the failure to discharge a legal duty, and consequently *consists* in some *act* or *forbearance* in violation of a legal right. * * Wrongs which infringe public legal rights are public wrongs. Wrongs which violate private rights are private wrongs."[1] This accords with the doctrine stated by an earlier writer of some authority, who declared that "a wrong is a violation of right. In its most usual sense it signifies an injury committed to the person, to his relative rights or to his property, unconnected with contract; but in a more extended signification, wrong includes the violation of a contract; a failure of a man to perform his promise, is a wrong to him to whom it is made."[2] Further, in a familiar class of cases, for one to threaten an act which if done would violate another's rights and cause irrep-

arable injury to him, will entitle the latter to preventive remedy by legal process.[3] And where, because of the interest which the public has in its performance, an obligation is imposed by law upon a person to do something that he fails to perform, whereupon another does this with the expectation of pay, on the refusal of the former to compensate him, the latter may sue and recover.[4]

[1] Amer. Jurisp., § 139.

[2] Bouvier's Institutes, Pl., 2208; 2 Bl. Com., 116; Bishop on Cont., §1418; Cooley on Torts, § 60. "The wrong may be done by the denial of a right; or by the refusal to respond to an obligation; or it may arise from mere neglect in the performance of a duty; or it may be an affirmative injury." Bliss on Code Pl., § 113.

[3] Holland's Elements Jurisp., 306; Robinson's Ibid, § 154.

[4] A defendant and his wife separated; she died, and the plaintiff, a distant relative, paid the funeral expenses, not knowing where he was. In an action for money paid to his use, a recovery was had. Ambrose v. Kerrison, 10 C. B., 776; Patterson v. Patterson, 59 N. Y., 574; Keener on Quasi-Contracts, 341; Cunningham v. Reardon, 98 Mass., 538.

§ 9. Such cases must go on theory of a wrong to the one suing. This, in legal conception, is an act which violates a primary right. That conditions its illegal character, but the act alone is in law the wrong. This important.

These cases for prevention and compensation can proceed only upon the theory of a duty

owed, its breach, and therefore as against the party suing, a legal wrong. This, it also may be observed, always requires an antecedent right as a condition of its existence; for the thing itself—that, which in legal conception, constitutes a wrong—is the act which violates such a right.[1] But for that, conduct, however bad in moral view, or injurious to social well-being, could not be a legal wrong. This is obvious upon its statement. Still, the *relation of the primary right to a wrongful act, as conditioning its illegal character, and the identification of the legal wrong with the act alone,* is very important for some purposes, and should be firmly grasped.

[1] This is most clearly brought out in one class of crimes. "The true view is," says Mr. Bishop, "that the infliction of the *mortal blow* constitutes the *crime* in felonious homicide." That is the act which causes the death, and so is itself the wrong. 1 Crim. Law, § 115, Note 2; Riley v. State, 9 Humph., 646.

§ 10. Wrongs may be classed as crimes, torts, breaches of contracts, and other violations of legal rights.

Upon the principles which have been stated, legal wrongs comprehensively may be classified as follows:

1. Public offenses—crimes and misdemeanors.[1]

2. Such misconduct as in technical sense constitutes a tort.

3. All breaches of contracts, express or implied.[2]

4. Any other act or forbearance in violation of a legal right.[3]

By way of illustration here, the outlines by Mr. Andrews, of the various actions and suits, legal or equitable, are worthy of consideration, as showing a variety of legal wrongs falling into the fourth class.[4]

[1] Perhaps it should be said that probably no private wrong can arise out of an act of treason or misprision of that offense. These are crimes which affect the body politic in its corporate capacity and interests only—not specially, as individuals. Generally, however, the "same facts may constitute a crime for which the offender may be punished at the suit of the public or state and a tort for which the injured party may maintain a civil action for damages." So, also, it is elementary that "many torts arise out of a state of facts which constitutes also a breach of contract." But manifestly this does not affect the classification of them as wrongs. 26 Am. & Eng. Ency. of Law, 73; 1 Bishop's Cr. Law, § 264; Bishop's Non-Contract Law, § 71; Holland's Elements Jurisp., 311. For the proposition that a cause for divorce may be regarded as a breach of contract, or as a "civil tort," see 2 Bishop on Mar. & Div., § 488.

[2] Chase v. Corcoran, 106 Mass., 286.

[3] Such, for example, as the refusal to correct a material mistake in a written agreement. Bliss on Code Pl., § 113, Note 1; Robinson's Elements Jurisp., § 139.

[4] American Law, 1073, 1092.

PART SECOND.

CHAPTER I.

LEGAL REMEDIES.

§ 11. Law of, includes all ways of redressing legal wrongs. One is by act of party injured. Defense of one's person, wife, child or servant. Recaption of personal property, retaking possession of lands, and abating nuisance. Distress. By joint act of all parties, as accord, and satisfaction, and arbitration.

In its broadest significance the law of remedy includes all lawful modes of redressing legal wrongs. One of these is by act of the party injured; as in "defense of one's self, or the mutual and reciprocal defense of each other by husband and wife, parent and child, master and servant." Another is by recaption or reprisal, which "happens when any one has deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child or servant; in which case the owner of the goods, the husband, parent or master, may lawfully claim and retake such property or person wherever found, so it be not in a riotous manner, or attended with a breach of the peace." Further, in analogy to the

right of recaption, a "remedy of the same kind for an injury to real property is sometimes permitted by entry on lands and tenements, when another person, without any right, has taken or retains possession thereof"; but this, also, "must be peaceable and without force or violence, which might endanger the public peace." Moreover, nuisances may, in some instances, be abated "by a party aggrieved thereby, so as he commits no riot in the doing of it." For example, if a bar or gate be wrongfully erected across the public highway, which is a common nuisance, one "passing that way may, if necessary for the exercise of that right," cut down and destroy such obstruction. Finally, there is the right of distress for rent in arrears, which came to this country as part of the common law. Closely allied to these modes of remedy, is that which comes by the joint act of all the parties, as in case of an accord and satisfaction, or the settlement of a controversy by arbitration.[1]

[1] 2 Broom & Had. Com., 1-3.

§ 12. Legal disputes nearly always determined by public tribunals. These within judicial power of government. That rests on ethical principles, constitution, and laws.

Of the countless legal disputes which arise, only in the rarest instances are adjustments effected by private acts of one or both of the parties thereto. Their determination is had by pub-

lic tribunals constituted for that purpose. These fall within the judicial division of governmental power, which rests alike upon ethical principles, embodied in ancient legal maxims, constitutional provisions, and legislation designed to render the latter effective in affording a means of redress for all legal wrongs, private or public.

§ 13. Judicial remedy by courts of justice. By their agency wrongs redressed, and so rights protected. Conservators of social order.

Remedy, by the judicial authority, is, of course, in and through courts of justice. Their creation, therefore, as the great instrumentality by whose agency and activity wrongs may be redressed, and incidentally to this, rights protected or enforced, is the most vital feature of remedial law—one upon which, in a degree not always appreciated, the peace and good order of society depend.

§ 14. Courts organized, problems of remedy, in formal aspect, questions of procedure. These, special proceedings, and action or suit. First, such remedies as do not result in a judgment. Were not in common law or equity practice, an action or suit.

Courts once organized, however, and open to such as need their help, within the various jurisdictions, problems of remedy resolve them-

selves, in formal aspect, into questions of procedure; and here the mode of seeking redress for alleged wrongs has fallen into what are known as special proceedings, and action or suit. The first are said to be "remedies pursued by a party which do not result directly in a judgment, but only in establishing a right, or some particular fact." [1] The line of demarcation between these two methods of seeking remedy is as clearly shown, perhaps, as the nature of the matter allows, by the proposition that "generally any proceeding in a court which was not, under the common law and equity practice, an action at law or suit in chancery, is a special proceeding." [2] When it comes to the application, however, of the rule thus implied, some conflict of opinion will probably be found between the courts of different states.[3]

[1] Estee's Pl., 18.

[2] 1 Ency. of Pl. & Pr., 112.

[3] In Ohio it was held that the "civil action of the code is a substitute for all such judicial proceedings as were previously known as actions at law, or suits in equity, and does not embrace proceedings in mandamus." Chinn v. Trustees, 32 O. St., 236. An early case in this state holds that a proceeding to probate a will is not an "action." The opinion, by Wright, J., says: "I should define an action to be an abstract legal right in one person to prosecute another in a court of justice; and a suit, the actual prosecution of such a right." (Hunter's Will, 6 Ohio, 501.)

What here is defined as an "action" very clearly is the *right* to action which springs from the law of remedy, upon the commission of a legal wrong; and in the light of that the distinction made between a suit and action is plainly fallacious. The one, as

much as the other, is the "actual prosecution" of the right to action—that is, to the exercise of judicial power for the redress of injury suffered.

The Revised Statutes of Ohio classify as Special Proceedings, actions to quiet titles and to recover the possession of real property—ejectment—as well as replevin, dower, divorce and alimony. Bates' Ann., Divis. VII, Chaps. 6, 7, 10 and 11. Still, equitable partition is held a civil action. Stableton v. Ellison, 21 O. St. 527; as is, also, a petition for dower. Cory v. Lamb, 43 O. St., 390. But a proceeding under the code to vacate a judgment is not. Taylor v. Fitch, 12 O. St., 169. Yet a petition in equity to impeach a decree for fraud is a civil action. Coates v. Chil. B. S. B., 23 O. St., 415. So, also, is one to make a joint contractor a party to a judgment. Yoho v. McGovern, 42 O. St., 11. And in a late case, Spear, J., says: "Our code does not, as does the code of New York, specify that every remedy which is not an action is a special proceeding, nor do our statutes give any definition of an action or special proceeding. But we suppose that any ordinary proceedings in a court of justice, by which a party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense, involving the process and pleadings, and ending in a judgment, is an action, while every proceeding other than an action, where a remedy is sought by an original application to a court for a judgment or an order, is a special proceeding." Miss. Soc. v. Ely, 56 O. St., 407. See also Hunter's Will, 6 Ohio, 499; Philips v. State, 5 O. St., 122; 64 Am. D. 635; Moore v. Boyer, 42 O. St., 312; Maginnis v Schwab, 24 O. St., 336; 1 Cyclop. Law & Proced., 720; 1 Estee's Pl., 18.

§ 15. About same principles apply to complaints in special proceedings as in actions. Hence, not further considered. Come to view in glance at law of remedy. Help make clear place and office of action.

Assuming that *mutatis mutandis,* complaints which are made the foundation of special proceedings, as regards the facts to be set out, involve very nearly the same principles that govern in what distinctively is an action or suit, it is not deemed necessary further to consider them, though in so brief a glance at the law of remedy they come into view and help to make clear the place and office of an action.

§ 16. Actions are civil and criminal. Necessary to define them. Various definitions noticed. None correct.

It is elementary that "actions are divided into civil and criminal." But, before proceeding to consider the right to, and cause for, them, it will be helpful to have the term accurately defined—its true import understood. A recent able volume says: "The most ancient and best definition of an action has been said to be that of the Mirror: 'an action is nothing else but the demand of right.'" [1] So, also, it is stated that "an action has been defined to be an ordinary proceeding in a court of justice, by which one party prosecutes another party for the enforcement and protection of a right, the redress or prevention of a wrong,

or the punishment of a public offense." [2] Another declares an action to be "a judicial proceeding for the redress or prevention of a wrong";[3] and Lord Coke defined it as a "legal demand of a man's rights." But all these, with others, varying slightly in form though in substance the same,[4] evidently are open to the criticism of the second one, by Mr. Estee, that in "some sense it is equally applicable to special proceedings." More truly, he says, an action "is defined to be any judicial proceeding which, if conducted to a determination, will result in a judgment or decree." [5]

[1] McKelvey on Com. Law Pl., § 8.
[2] 1 Estee's Pl., 17.
[3] Bliss on Code Pl., § 1.
[4] 7 Lawson's Rights, etc., § 3404; Fitman's Trial Proced., § 155.
[5] Estee's Pl., 17.

§ 17. Further criticism of. Action is that of party and court in which one seeks remedy, by judgment or decree. Elements in two definitions noticed best define it. Is a judicial proceeding for the redress of a wrong which, conducted to a determination, will result in a judgment or decree.

Against the definitions from the Mirror, and by Coke, the further objection lies that they are not in accord with the fact. An action is not so much a demand of right, as of remedy. While a suit involves questions of right, still it is redress for some alleged wrong that, in truth,

is sought for, and in which the action is expected to eventuate. But in order to reach a true understanding of the matter, and so frame a correct definition, it must be remembered that the "action" under consideration is what a person does in a declaration, bill, libel, or the public, by an indictment, to show a court that he is entitled to its intervention, together with what is done through the agency of judicial administration, which, pushed to the end, affords the relief asked, in the form of a judgment or decree. From the point of view thus gained, it is clear that the term best can be defined by combining the two more essential elements given respectively by Mr. Bliss and Mr. Estee; and so regarded, an action is *a judicial proceeding for the redress of a wrong, which, conducted to a termination, will result in a judgment or decree.* This marks its primary and paramount object, on the one hand, and upon the other distinguishes it from a special proceeding; thus giving to the word an essentially complete definition.

[1] Mr. Broom, in his Commentaries on Common Law, takes Coke's as his definition of an action at law. That in the text, however, is the more comprehensive, and hence truer one, evidently, inasmuch as it includes not only what the plaintiff in a case asks, but also the judicial activity by which the redress sought is obtained.

§ 18. Expression, bringing an action, means only that steps to set before court facts entitling to relief have been taken. Same as to forms of action. These modes of doing this according to differing causes for action. This office of declaration, bill, libel, or indictment.

By common parlance, in legal circles, a suitor is spoken of as bringing, or having brought, his action. But strictly speaking this means—and can only import—that he took, or will take, the steps requisite to present to a court such facts, as, in view of rights with which the law invests him, should move it to act, by the exercise in his behalf of its remedial powers. And much the same may be said in regard to the various forms of action. These, in the last analysis, are modes merely, in which, according to their legal nature, differing causes for action must be placed before a tribunal unto whose authority to redress alleged wrongs, an appeal is made. This is the act of the party, in accordance with an established procedure, but to the end of inducing action by a court to give relief for some injury he has suffered. "In all actions at common law," says Mr. Lawson, "it devolved upon the plaintiff to take the initiative in the pleading, which was done by means of the declaration. Its office was to set forth the cause of action in proper technical and legal form."[1] The same is, of course, equally true of a petition under the code system, a bill in chancery, libel in admiralty, or an indictment

for crime. Or, as is stated by Mr. Lube, "a suit is the form of application to the judicial power of the state, for the *redress of injuries alleged to be sustained.*

[1] 7 Rights and Rem's., § 3407; Lube's Equity Pl., 24. See also, 156, 179.

CHAPTER II.

THE RIGHT TO ACTION.

§ 19. Effect of wrong by one to another, as to their relations to the law of remedy. Before this was done, neither could invoke its aid; but after, it may be put in motion against the wrongdoer. He then subject to its compulsion.

When, in legal sense, a wrong has been done by one person to another, the relations of both to the law of remedy are thereby changed in vital particulars. Until the unlawful act, as against the other, neither could invoke its aid or be held responsible to its process. Potentially only, might one truly be said to have any rights under or by virtue of that division of the law.[1] But after the commission of a wrong, the injured party properly can do what before was legally impossible. Through the agency of a court of competent jurisdiction he may put the remedial law in motion against the wrong-doer; for by his misconduct the latter made himself amenable to its proper demands, and so became subject to its compulsion.[2]

[1] "So long as all goes well, the action of the (remedial) law is dormant." Holland's Elements Jurisp.,

306; Clark vs. Eddy, 22 Cin. Law Bull., 63; 10 Ohio Dec. (reprint), 539.

[7] Broom's Com. on Com. Law, 109. "The State," this writer says, "assumes to itself the task of deciding * * whether a wrong has been done," as well as "of vindicating the party aggrieved against the aggressor." That, he adds, "is effected in very many cases through the medium of an action at law, whereby an individual puts in motion the machinery provided by the State for the purpose of obtaining a formal recognition of the justice of his claim, and then of compelling its enforcement against his adversary." Of course, this applies to all other suits, civil or criminal.

§ 20. Title to redress, wholly independent of the substantive law. That furnishes the rule by which to determine whether an act infringes a legal right. But it is the law of remedy, when wrong done, which gives a right to action.

From this it appears evident that the title to redress for wrongs committed is wholly independent of the substantive law. That, as has been shown, establishes the rule by which to determine whether or not a specified act is an infringement of any legal right. But this ascertained, it is the law of remedy alone, which, conjoined with the wrong done, gives a right to action. Hence, as its essential elements, that right includes (1) the existence of a legal wrong, and (2) that part of the law which provides the means for its redress.

CHAPTER III.

THE CAUSE FOR ACTION.

1. On Principle.

§ 21. Meaning of the word "cause," as shown by lexicographers.

Perhaps brief notice of the import of the word "cause" may aid in the discussion of this subject. Various meanings are given to the term by lexicographers. But few of these—only those lying nearest to its application here—need be stated. It is derived from the Latin, *causa,* defined as "that on account of which a thing is done; that which supplies a motive or constitutes a reason." [1] Again, a cause is said to be "that from which anything proceeds, and without which it would not exist." [2] Once more: "that by the power of which any event or thing is; a principle from which an effect arises; that upon which something depends *per se.*" [3]

[1] Anderson's Law Dict. "Causa."
[2] Ibid, "Cause."
[3] Century Dict., — "Cause."

§ 22. The term relates to what induces courts to act, as shown in an indictment, declaration, bill or libel. The element in each, which becomes a sufficient reason for action, is some legal injury.

In applying the term, one is to bear in mind that it is used here with respect to judicial tribunals, and has reference to that which induces them to act, by putting in motion the machinery of administration at their command, on the application of some person seeking to have this done. Hence, a court may be conceived as asking a party why it should take the steps which he demands, and his answer to the inquiry, embodied in an indictment, declaration, bill or libel, as giving the legal reason therefor. Now what is the one element common to all these forms of supposed response, the presence of which a judicial tribunal in such cases could look upon as showing in a party the right to call upon it for some form of legal redress? Or, put in the language of the definitions of "cause," which "constitutes a reason" for action, and "without which" a right to it "would not exist," or upon which this right "depends *per se*." As a principle running through the entire system of remedy, by action or suit, is it not that some legal injury has been done to the one who asks the intervention of the court?[1]

[1] Here it is pertinent to recall the wisdom of Lord Bacon. "It were infinite," said he, "for the law to consider the cause of causes and their impulsions one of another; therefore it contenteth itself with the *im-*

mediate cause." Holland's El's. Jurisp., 144. That this is always the delictum of which a party complains who seeks the remedial action of a court of justice, is too patent for debate. Yet it is true, as Mr. Bliss observes, that all legal wrongs do not involve blame—"as, where a trustee applies to the court for direction in the execution of the trust * *. Theoretically, there is a wrong; for when the court gives construction to an instrument, or declares a duty, it is such as the party himself should have understood and performed. And in an action for the reformation of a contract, the wrong may not have been voluntary, inasmuch as the accident or mistake may have arisen without defendant's fault. *He commits a wrong, however, by refusing the remedy without action.* But if under disability, or if other rights have been intervened, so that the action of the court becomes necessary, the plaintiff has suffered a wrong, and the question of blame is only material as affecting costs or some other penalty." And he adds, that in speaking "of the action as necessarily prompted by a wrong, special proceedings not antagonistic in their nature, and where the action of the court is as much administrative as judicial, are not referred to." Bliss on Code Pl., § 113, note 1.

§ 23. As above seen, a legal wrong is an act which violates a primary right. With this the law of remedy has nothing to do. Right to action is wholly independent of substantive law. Neither nor both can create that right, of their own force. But on the commission of a wrong the remedial law instantly gives it.

As has been seen, a legal wrong is an act either of omission or commission, which violates a primary or antecedent right. With the causing of this, the law of remedy manifestly can

have nothing whatever to do. Equally clear is it that a right to action is wholly independent of the substantive law. Neither that nor the adjective law, separately or conjunctively, can create such right. The substantive law constitutes the rule by which to determine whether or not any particular act is legally wrongful—hence, conditions its character in that regard. But if a wrong be done, by the operation and effect of the remedial law, a right to action arises. What before had a merely potential existence, by the injury, became actual in the party that affects.[1]

[1] "It is a maxim of the law that *ubi jus ibi remedium,* or wherever a legal right exists to be invaded, the law will give redress when it is violated." Robinson's El's Am. Jurisp., §148; Holland's El's Jurisp., 306; 1 Cyclop. Law and Proceed., 700; Andrews' Am. Law, §643.

§ 24. Cause for action now clear. Until a wrong is done, the law of remedy lies dormant. But the same facts show a legal wrong and cause for action. Both exist or neither does. Thus the wrong is identified as the cause.

From the point of view thus obtained, the true cause for action seems quite clear.[1] Until a legal wrong has been committed, the law of remedy lies dormant, and no one has any ground for calling upon a court of justice to intervene in his behalf against another. Under those conditions, cause for its so doing can not truly be alleged. But *simul et semel, the same facts show*

the commission of a legal wrong and also a cause for action. The act which constitutes the one, necessarily gives rise to the other. Both exist, or neither does. A wrong in every case implies a cause for action, and *vice versa.*[2] And this is true of all actions, criminal and civil, at law, in equity and admiralty. Is not the wrong, then, on the basis of legal principle, beyond question identified as the cause? By force of the law of remedy, upon its commission there arises a right *to* action, and when properly shown by the facts, it becomes to a court the sufficient cause *for* action.[3]

[1] What a party seeks in a suit is redress by means of some action of a court, and he may not have this until he shows a cause *for* not "of" it. So the phrase, right *to* action is preferable to the older one, especially with students. It is better to drop the figure and bring the form of expression into exact accord with the facts. See Phillips Code Pl., § 30 and Note 1. I also find in Pollock and Maitland's History of English Law, "that every cause *for* a civil action in the King's court is an offense," etc. Vol. 2, 572.

[2] In his learned work on the Common Law, Mr., now Justice, Holmes, says: "It can not be inferred from the mere circumstance that certain conduct is made actionable, that therefore the law regards it as wrong, or seeks to prevent it. Under our mill acts a man has to pay for flowing his neighbor's lands, in the same way that he has to pay in trover for converting his neighbor's property. Yet the law approves and encourages the flowing of lands for the erection of mills." (P. 148.) The case stated is that of a right granted to flow lands for a certain purpose, coupled with an obligation to compensate the owners for injury thus caused. This takes from the act of flowing its wrongful character as a trespass or

nuisance. In other words, such laws legalize the flowing for mill purposes, and limit the right of the land owners to the recovery of pay therefor. Up to the point of compensation, therefore, no wrong has been done because no right has been infringed, and if payment be made, none can arise out of such a transaction. In that event the power to flow is exercised and the obligation consequent thereon discharged. But suppose that one who flows the lands of another refuses or neglects to pay the owner. Then, evidently, a right of the latter has been violated—a legal wrong done him—that becomes a cause for, and to which the remedial law attaches a right to action. Thus it will be seen that in such cases it is not the act of flowing lands which is actionable, but the failure to compensate the owner. The two things are quite distinct—made so by the law. But for the authority it gives to flow, that act would be a nuisance, hence, a wrong and cause for action, to which the damages become an incident. The statute operates to change the land owner's right, at this point, by confining it to the recovery of payment. Hence, in an action he no longer can count on a trespass, but merely upon the refusal to pay. All in all, this amounts to an appropriation of an interest in lands to mill uses, reserving only the right to compensation therefor. That is clearly recognized in Boston & R. M. C. v. Newman (12 Pick., 467; 23 Am. D., 622). The opinion reviews the Mill Acts, giving to them the effect above stated, finally saying: "The depriving one of the beneficial use of his lands is, in the sense of the law, a taking of his lands. It would be very clear in the case of flowing." Nor would this be altered by the circumstance that the parties concerned were unable to agree upon the amount to be paid, and suit was brought. Except by a tender, which, in its adjudged sufficiency, proved to be tantamount to payment, the defendant would none the less be in default, hence, guilty of a wrong to the plaintiff for which an action would lie. With deference, then, to so eminent a legal scholar and thinker, I must insist upon the principle as uniform

in our jurisprudence, that no conduct will give rise to a right to action, which in legal contemplation is not wrongful. To my mind, this is axiomatic in the system. Broom's Com. on Com. Law, 108; Robinson's Elements of Am. Jurisp., § 148; Holland's Elements, Ch. 13; Andrews' Amer. Law, § 646.

[3] Phillips Code Pl., § 31. In a note to this section, Mr. Pomeroy's "Remedies," is quoted to show that not only in the passages referred to, but also "throughout his work he plainly uses 'right of action' and 'cause of action' as equivalent and interchangeable terms." Then, very truly, it is said: "This discrepant and inaccurate use of these important terms must tend to obscure, rather than to elucidate, the principles of a science wherein clearness of conception and perspicuity of statement are most essential." I much regret that Judge Phillips did not press his investigations far enough to see the further error into which Mr. Pomeroy fell, respecting the cause for action.

§ 25. This results from a true analysis of the operation of the substantive and remedial law upon facts giving title to redress by suit. The principle runs through all judicial administration.

The conclusion reached appears necessarily to result from a true perception and analysis of the operation and effect of the substantive and remedial law upon the "investitive" facts, which give a party his title to redress, by means of a suit. Moreover, it shows a principle, plainly running through all cases in every department of judicial administration, at once simple, clear and easy of application. The moment the *wrong* is distinctly seen, the *right* to action appears, and the *cause* for it becomes manifest.

CHAPTER IV.

THE CAUSE.

2. Legal Treatises.

§ 26. These differ on this subject. Phillips, on Code Pleading, makes strongest presentation of other side. Quoted for discussion.

These, as will be seen later, like the cases, differ with respect to the conclusion reached above on this subject. As the work on Code Pleading, by Judge Philips, makes much the strongest presentation of the opposing view to be found in the books, he is quoted for the purpose of discussing it.

§ 27. Gives his views on cause for action, in having a primary right and duty, and delict of party owing duty, as its "two constituent elements." Also, that these rights and duties, and violations of them, "constitute rights of action." Finally, that primarily an action is not for the redress of a wrong, but "to protect a right."

"When a legal right is wrongfully infringed, there accrues, *ipso facto,* to the injured

party, a right to obtain legal remedy, by action against the wrong-doer. * * * A statement of facts to constitute a cause of action, must show a right of action; to show a right of action it must state facts to show (1) a primary right and its corresponding duty, and (2) the infringement of this right by the party owing this duty. From the one set of facts the law raises the primary right and duty, and to the other set of facts attaches a remedial right or right of action. * * This primary right and duty, and this delict of the party owing the duty, are the two constituent elements of a cause of action. * * Primary rights and duties, and violations of these, depend upon, and are governed by, the substantive law. It is these rights and duties, and violations thereof, actual or threatened, that constitute rights of action; and it is the statement of the facts showing at once the existence of such primary right and duty, and a violation thereof, that constitutes a cause of action. But such facts are operative only by virtue of the substantive law. * * Primarily, an action is not for the redress or prevention of a wrong; it is a proceeding to protect a right. The basis of every action is a right in the plaintiff; and the purpose of the action is, primarily, to preserve such right. Subservient to this primary object of the action, is compensation for the infringement of the right."

§ 28. Separate bearing of substantive and remedial law on acts which are legal wrongs, and rights growing out of them, not seen. While distinguishing between right to and cause for action, analysis not exhaustive.

These passages briefly but fairly present the author's views and the grounds on which, essentially, he rests them. But some confusion of thought seems to be shown, apparently from not taking into account the separate bearing of the substantive and remedial law upon acts which are legal wrongs, and the rights that grow out of them. It therefore must be said that while he has made an important advance beyond the work of Mr. Pomeroy, in distinguishing the right to from the cause for action,[1] yet his analysis of the subject is not for its purposes sufficiently exhaustive.

[1] Code Pl., § 31. In his note (2) to this section the learned author says: "The distinction here made between right of action and cause of action is one not found elsewhere, so far as I am aware." His work was published in 1896. But in 1889 I had clearly worked out the distinction, and put it upon essentially true grounds, in the case of Clark v. Eddy, reported in 22 Ohio Law Bull. (63-67; 10 Ohio Dec., reprint, 539). I am happy to have my conclusions at this point supported by the independent investigations of so able a writer.

§ 29. Distinctive effects of substantive and remedial law, with reference to wrongs, not fully considered. Whether an act is in law wrongful, former gives rule to determine. This is wholly apart from

law by which right to remedy comes. Act would be illegal, as violating primary right, if was no remedial law. Wrong not seen to be wholly in unlawful act. Primary right related to this, only as condition. Act is the delict, not right it infringes. While perceiving that from a wrong right to remedy "accrues," not noticed that this arises from remedial law. Violations of primary rights do not "constitute rights of action"—are *per se* inadequate to that result.

Very evidently, with reference to a legal wrong, the distinctive effects of the substantive and remedial law have not been fully considered. As the sole basis of primary rights, the former furnishes the rule by which to determine whether or not a particular act is in law wrongful. This, however, lies entirely apart from, and is wholly independent of, the law from which a right to remedy comes. The illegal character of the act as an infringement of some antecedent right would none the less attach to it if there was no remedial law. Further, the wrong is not apprehended in its real character, as residing solely in an unlawful act. The primary right is related to this only as a condition of its commission. That is, if no such right existed, it, of course, could not be violated, and a legal wrong would be impossible. But it is to be observed that the *act* constitutes and is, the *delict*—not the right it *infringes*. Hence, while the author saw that, when a wrong is committed there "accrues the right" to "legal rem-

edy," that *this is conferred by the remedial law, was not perceived.* A wrongful act renders that instantly operative, of its own force, to give a right to action; but with this the substantive law has nothing to do. By defining them, it creates primary rights, but violations of these do not in proper sense "constitute rights of action." The true view here is that such acts are legal wrongs, to which the law of remedy attaches a right to action. The infringement of a primary right, *per se,* is utterly inadequate to that result.

§ 30. Real basis of action is right to redress it calls for. Only remotely can rest on primary rights. As a mere sequence, it protects them. Primary object of actions, redress for wrong done. Right to this, by the law of remedy, moves courts to act in behalf of suitors.

The basis of an action undoubtedly is a right in the plaintiff. But right to what? Obviously, if his case be admitted or proved, to have the *court* act, by giving him proper redress. Remotely, and in the view that draws into a "cause" all antecedents, suits can be said to rest upon primary rights, and with equal truth on the existence of organized society. Sequently, they may operate as a protection to both, though not of one more than the other. But their primary purpose and great object is, and ever has been, restraint, compensation or punishment for wrongs inflicted, or the recovery of property.[1] And, as I appre-

hend, it is the right of suitors to such relief, based upon injuries they have suffered, and the rights thereby arising from the law of remedy, which moves courts to action in their behalf. Judicial tribunals are not concerned about the protection of primary rights, save as that is an incident of the redress which, by force of the remedial law, they are bound to give to an injured party, when their violation has been duly shown. The sound doctrine here is, as "assumed" by Mr. Broom, "that an action will only lie for a legal wrong";[2] the logic of which seems to be that its original and chief object is legal redress.

[1] "The primary object of every effort of remedial justice is satisfaction for the wrong committed." Robinson's El's Jurisp., § 149; Bishop's Non-Cont. Law, § 487; Bond v. Chapin, 8 Met., 31; 1 Estee's Pl., 17; Lube's Eq. Pl., 24. "The more effectually to accomplish the *redress of private injuries, courts of justice are instituted* in every civilized society, in order to protect the weak from the insults of the stronger, by expounding and enforcing those laws by which rights are defined and wrongs prohibited." (2 Broom & Hadley's Com., 2.) So, Mr. Andrews, after referring to the Constitutional obligation, under the Fourteenth Amendment, to protect the rights of all, says: "The right is not perfect unless the means for its protection are perfect; and it is the duty of *courts to devise the means of redressing wrongs.*" (American Law, 1027; Edwards v. Kearzy, 96 U. S., 565.)

[2] Com. on Com. Law, 108.

§ 31. But if protection of rights was great purpose of actions, cause therefor would be legal wrong. Proposition illustrated.

However, if the great purpose of actions was the protection of antecedent rights, still, the cause for action would be found in a legal wrong. Until that is shown, no right to action appears, while upon its admission or proof, a cause for action at once becomes legally manifest. Both arise from the wrong, and the law of remedy. In them is the root and legal life of the right to and cause for action. Primary rights have no relation to either, except as a condition to the existence of legal wrongs. They are no more a part of the cause for judicial intervention, than is a public way on which a log wrongfully is left, over which one falls to his hurt. Putting the obstruction there was the wrong, to which the road is related simply as one condition of the tortious act—not as any part of the cause for action to redress it. So, the presence of and right to life are conditions essential to murder, but in no admissible sense a part of the crime, or of the cause for action which it brings into being.[1]

[1] State v. Ballar, 26 W. Va., 94.

§ 32. Old works on pleading, practice, even abridgements and law lexicons, while using phrase, "cause of action," did not define it.

Here it is to be observed that, apart from some adjudged cases, the question was left un-

touched under the old law of procedure. The phrase, "cause of action," was constantly used, but in works upon pleading, practice—not even in the early law dictionaries or abridgements—ever defined.[1] They treated—many of them with great fullness—the various forms of action, and went into particulars respecting what it was necessary to allege and prove, in order to maintain them, but in none was the cause for action isolated and discussed.[2]

[1] This, however, relative to a bill in chancery, applicable also *mutatis mutandis* to a code petition in equity, pertinently may be added: "The third part is the premises, or, as it is more usually styled, the stating part of the bill, which contains a narrative of the facts and circumstances of the plaintiff's case, and of the *wrong or grievance of which he complains.*" Story's Eq. Pl., § 27

[2] In illustration of his views, Judge Phillips says: "The statement that A sold and delivered to B a horse for $100, to be paid in ten days, shows a primary right in A to receive $100 at the time fixed for payment, and the corresponding duty of B to make payment accordingly. *But this statement does not* show a right of action, because no delict is shown. If a statement of facts be added, showing that the ten days have passed, and that payment has not been made, the remedial right appears, and the combined statement is a good cause of action * *" Code Pl., § 32. But suppose it was a suit to recover damages for a simple assault. Then only the "culpatory" facts should be averred, and this for the reason that the court takes judicial notice of the primary right which has been violated. In such a case the illegal act obviously is the wrong complained of, and so becomes the cause for action. The antecedent right to personal security, infringed by the assault, is a condition

to that form of tort, but manifestly not a cause of it, nor of the right to action arising upon its commission. As settled in the law of felonious homicide, it is the *act* causing a death that is the *crime*, and which, therefore, the law regards as the wrong and cause for action. The cases on contracts differ simply in the circumstance that a court can not judicially notice their existence, or the rights arising from the obligations which they impose. Hence, in order that these may appear in actions *ex contractu*, the facts showing an agreement must be alleged. But that does not make them part of the cause for action, because in such cases, as in the assault, or homicide, the primary right is a condition merely to the existence of the wrong which is the ground of complaint, and that, in respect to contracts, consists in a breach of their obligations. As said by Pigott, B., in Durham v. Spence, L. R., 6 Ex., 46: "No doubt, to make the act or omission complained of a cause of action, a contract must have preceded; but so also a negotiation must have preceded the making of the contract. Yet, I should not include that negotiation, *nor any of the other circumstances that might form part of the necessary evidence in the cause, as the ground work of the cause of complaint, but only the cause of complaint itself that is the breach.*" Hibernia N. B. v. Lacombe, 84 N. Y., 383.

§ 33. Since Code system appeared, question considered. Pomeroy's work on Remedies discussed it. Confused right to and cause for action—showing incomplete analysis.

Since the adoption in this country of what Mr. Pomeroy, in his work on Remedies, termed the "Reformed American Procedure," and especially after its enactment in England, the question of what constitutes the cause for action

has been more considered. The "Remedies" is the pioneer, in a philosophical examination of the code system in its relations to the procedure it so largely displaced; and the masterly ability of the work justly has given it great influence, not only with the profession, but the courts as well. So far as I am aware, its conclusions as to the cause for, and right to, action constitute its one vulnerable part. That the analysis upon which they are founded is incomplete—the cases were not examined—is demonstrated by the fact that the "right" was not discriminated from the "cause."

§ 34. Mr. Bliss, in his Code Pleading, made strong the cause for action in Civil Cases. Phillips followed, showing Pomeroy's error in confusing "right" and "cause." Agrees with him as to latter.

About two years after the Remedies appeared came the equally able treatise on Code Pleading, by Mr. Bliss. This, as against Mr. Pomeroy's view, but without discussing that, made the "wrong" alone the cause for action, in civil cases. The right to action, however, was not particularly considered. Eight years later, the work by Judge Phillips, whose views have been discussed, was given to the profession. He marked the distinction between the right to, and cause for, action, and pointed out the confusion into which Mr. Pomeroy had fallen, regarding them.[1] Nevertheless, the work does not show any examination

of the cases.[2] Thus much, it has been thought best to say in reference to standard, and perhaps about equally weighty treatises, which consider this question.

[1] I. McKelvey's Com. Law Pleading, already referred to, defining an action as simply "the demand of a right"—clearly a defective view, as I think has been shown—proceeds to classify actions "upon a distinction between the rights sought to be redressed." These, also, he divides into "acquired" and "natural rights." (§ 8.) Again, in a note to section 18, discussing the action of Detinue, which is classed as one "based on acquired rights," it is said that "to say an action is for a wrong, does not distinguish it, as every action is for a wrong." P. 12.) Further on is this: "The actions of trespass, trover, replevin, case and ejectment are alike in that they are used to redress similar wrongs—wrongs which are violative of original or natural rights." (§ 43.) Once more: "To show a good cause of action in trespass for injury to the person, the declaration need contain only a statement of the wrongful act. This is only an apparent exception to the general rule that in all forms of actions the declaration must contain a statement of the right and of the violation of that right, or the *wrong*." (§ 49.)

a. As respects the two alleged classes of rights, it seems to me clear that the learned author has fallen into error. Any right for the violation of which the law gives redress, is a legal right, simply—so far as the civil authority can take cognizance of it—nothing more and nothing less. As Mr. Andrews truly states, in his masterly treatise on American Law, "there is no such thing as natural rights or absolute rights existing within organized society; all rights within the body politic are relative and subject to the law of the land. What one has a right to is his; and to call it absolute," or natural, I may add, "does not make it any more his own." (§ 106.)

b. Mr. McKelvey does not seem to be clear in respect to what is the true legal cause for action. In the passage from the note, "every action" is said to be *"for the wrong"*; and in all cases, it is stated, a *wrong* must be shown. For example, he says a declaration in debt should contain "a statement of the right on the part of the plaintiff," and "statement of the wrong or violation of the right by the defendant." (§ 21.) But this is true, so far as respects a proper averment of facts, whether the cause for action be regarded as residing in the wrong alone, or as including both the contractual right and its violation. Decided ground, therefore, between the conflicting views at this point, of Mr. Pomeroy and Mr. Bliss, is not taken.

II. The profoundly able and learned work on American Law, above referred to, says: "A cause *for action* by the court arises when a case, or controversy or subject matter, of which the court is authorized by law to take cognizance, is submitted to the court for its action in the manner provided by law." This is in perfect accord with, and indeed a support to, some parts of my text, as its reading will show. But in immediate connection, the author speaks of *"the cause of action* which *belongs* to the party," etc., (§ 646.)

a. In my view, this clause confounds two different things—a *right* to, and *cause* for action. The former undoubtedly is the subject of ownership; hence truly can be said to belong to one in whose favor it has accrued. He may transfer it to another who thereby will be entitled to the redress or remedy with which this right invested its original owner. But the *wrong* which is the *cause* for, and that by operation of the remedial law gives rise to a *right* to action, *exists* simply—is the subject, properly speaking, neither of possession nor ownership. It stands as a wrongful *"act* or *forbearance,"* as Prof. Robinson says, "in violation of a legal right." Condonement or redress can not change its character, though they serve to satisfy a demand in part, based upon it. The *delict* still in law and fact remains, as well after the right to redress has been realized, as before, but be-

longs to no one in the latter case any more than the former; that is, not at all. Like a crime, which also is a tort, the legal idea of ownership can not attach to it, for, in the last analysis, a wrong identifies itself with some legal "fault" of the delinquent party. That, evidently, is in no sense reducible to possession, and paradox would pass into contradiction, by speaking of it as belonging to any one.

b. Again it is said that "the elements of a cause of action are the deprivation or infringement of a right, and detriment or damage to the plaintiff. * * A mere accident is not the basis of a suit, for, unless there is *fault,* an injury must lie where the damage falls. * * It is not necessary that the extent or amount of the injury can be measured or compensated in money. The law does not measure amounts *where a right is infringed.* * * *" (§ 646.) This has been quoted for the purpose of saying that what is spoken of as the elements of a "cause of action," are to be read as the essentials to an actionable injury. Whenever that exists, it constitutes a *wrong,* but this has been shown to reside wholly in some *"act* or *forbearance"* which violates a legal right. (See sec. 43 *post,* and note 1.)

And this also: "The cause of action," says Phillips, "'is a formal statement of the operative facts that give rise' to the right of action, and these formal statements are very clearly distinguished from each other. In this matter it is essential to distinguish between the grounds of action, cause of action, and the transaction in which and out of which these arise." (§ 651.) With reference to the latter clause, a case is given as an appendix, from 7 Yale L. J., 245. In a note, appreciative expression is also made regarding the services of Judge Phillips, in "making clearer than ever before, the distinctions between the right of action, the transaction out of which it grows, and the cause of action." With this I am in hearty accord. My difference with the judge is stated (*supra,* §§ 27-30), and is not referred to for further discussion here. His error, however, in one aspect, seems to have crept into the

text of the American Law—*by its form of expression.* To my thought, the cause for action is *not* a "formal statement of the facts that give rise" to a right of action. In the first place, from *no* body of facts does that right spring. On the contrary, it arises *wholly* by force of the remedial law, when a legal *wrong* has been committed. The latter is the *cause* for action; consequently, the "operative facts" are those which *make its existence apparent.* Hence, if these are properly stated to a court having jurisdiction in the premises, a right to, and cause for, action become legally manifest. The able, and, on some points, very valuable opinion of Judge Prentice, from the Yale Law Journal, follows Pomeroy and Phillips as to the cause for, and the latter, respecting the right to action. No examination of the authorities, or any independent analysis of the subject, on principle, is shown. Apparently, for the purposes of the real controversy in the case—whether or not, under a Connecticut Practice Act, two causes for action properly could be stated in one count—it was regarded as sufficient to mark the distinction between the "right" and "cause," without going into an investigation of the latter. At all events this was not done, nor was it required for the decision of the question before the court. The case leaves that matter, therefore, where the learned jurist by whom it was heard, found it.

§ 35. A late work upon Pleading and Practice gives what writer supposed to be "generally held"—following Mr. Pomeroy's view.

The Encyclopedia of Pleading and Practice, now in course of publication, in its text says: "A cause of action is generally held to be a union of the right of the plaintiff and its infringement by the defendant. Some authorities hold that the cause of action is the act or delict on the part of

the defendant which gives the plaintiff his cause of complaint; they reject, as unnecessary to the definition, the right of the plaintiff." Cases upon these conflicting propositions are cited more fully than elsewhere then was to be found, but not exhaustively.

§ 36. The same done by Cyclopedia of Law and Procedure. Neither goes into exhaustive consideration of question.

Since writing the foregoing, the able and learned first volume of the Cyclopedia of Law and Procedure has been published. At the beginning of its luminous treatment of "Actions" is this: "The term, 'cause of action,' in law, is generally understood as meaning the whole cause of action; that is, every fact which it is necessary to establish, in order to support the right to judicial relief. As otherwise defined, it consists in a right in the plaintiff, a correlative duty or obligation resting on the defendant, and some act or omission done by the latter in violation of the right. The words, 'right of action,' are sometimes used interchangeably and as synonymous with 'cause of action.' In other cases the words, 'right of action,' are held to refer only to the right to remedial relief, the right to sue, which arises upon the cause of action being complete." This is its entire text upon the subject. It did not comport with the plan of the work, nor of the one mentioned in the preceding section, either on principle, or by a review of the whole body of cases, to go

into an exhaustive consideration of the question. Hence, they stopped with a statement, clearly made, of what, from the authorities cited, was conceived to be the more general rule or understanding.[1]

[1] Maxwell's Code Pleading has this rather dubious statement: "What constitutes a cause of action? I know of no adjudicated cases that attempt to give a definition that will apply to all cases. Perhaps the definition of Prof. Pomeroy is sufficiently accurate, that where the facts pleaded show one primary right of the plaintiff, and a wrong done by the defendant in respect of such right, the plaintiff has stated but a single cause of action, although he may claim and pray for many kinds and forms of relief." Again it is said: "The words 'cause of action,' used in the code, evidently refer to what constitutes a cause of action either at common law or in equity. The forms of action are abolished, but there must still be such a statement of facts as show a liability of the defendant in favor of the plaintiff."

No authorities are cited or analysis of the subject attempted, on principle. The reference to Mr. Pomeroy makes it pretty clear that the views of the latter were not entirely satisfactory to the writer. So, as in Wait's Actions and Defenses, and Lawson's Remedies, the question of what in true legal view constitutes a cause for action, as well as the recently recognized distinction between that and a right to action, are left *in nubibus*. This, together with the differences on the subject between Mr. Pomeroy and Judge Phillips upon the one side, with a small support from the adjudged cases and Mr. Bliss, on the other, sustained by their far greater weight, are a sufficient justification for its thorough investigation here in the light both of principle and authority.

§ 37. Mr. Estee's discussion of cause for action. Facts cannot truly be said to constitute action or cause for it. It is the legal wrong which the facts evince, which in legal view is the cause.

In his well known work on Pleadings and Practice, Mr. Estee says: "In every case there must be a cause of action; that is, a right on the part of one person, the plaintiff, combined with a violation or infringement of that right, by another person, the defendant." Put in other words, which show the matter in its true light, there must be a legal wrong, which always consists in some "act or forbearance in violation of a legal right." This is what constitutes the cause for action, which is made manifest to a court by such averments of fact as show the *delict*, redress for which is sought by a suit. But it further is said: "The expression, 'cause of action,' includes in its meaning all the facts which together constitute the action * * ." Here, entirely distinct things are confused. As has been shown, the action in question is that of the court, and a plaintiff in a case is called on simply to show upon the record a cause for, and right to, this, by virtue of law, which is judicially noticed, and of facts alleged, that if admitted or proved, establish both. It is very clear to me that no set of facts can accurately be said to "constitute the action," nor the "cause" for it. As has been stated already, their one and sole office is to enable a court to see that a reason for, and right to, its intervention exists.

The *thing,* therefore, which in contemplation of law as its *cause,* becomes a ground for action, is *not* the group of *facts* alleged in a declaration, bill or indictment, *but the result of these in a legal wrong, the existence of which, if true, they conclusively evince.* When this has been seen, and it also is discerned that every violation of a legal right is a legal wrong, the whole matter becomes plain.

CHAPTER V.

CAUSE.

3. The Adjudged Cases.

§ 38. **Treatises referred to fail to cite the adjudications fully. Some conflict between them, but their greater weight for conclusions reached on principle.**

Having traced out on grounds of principle what in all cases is the real cause for action, and also to some extent considered the treatises that discuss the subject, I now come to an examination of the adjudications which relate to it. By none or all of the works referred to have they been fully cited. Moreover, while there is conflict in these authorities, it will appear that by much their greater weight the conclusions reached by the analysis and application of settled legal principles, are fully sustained.

(*a*) On Statute of Limitations.

§ 39. **Decisions on statute of limitations. Time cause for action arose must be fixed. Necessary to decide what constitutes cause. This often done, under statute.**

"The common law fixed no times as to the beginning of actions. Limitations derive their

authority from statutes "[1] which "fix the time at the end of which no action at law or suit in equity can be maintained." [2] Consequently, when the bar of such a statute had been interposed, it often became "important to determine the exact time" that the cause for action arose. To ascertain that, however, it was found necessary to pass upon what constitutes the "cause"; and this for the obvious reason that, until a cause of action existed, the limitation set up could not operate upon it. Accordingly, that question has been adjudicated more frequently in cases involving the statute of limitations than in any other branch of the law.

[1] Per Swayne, J., U. S. v. Thompson, 98 U. S., 488.

[2] 13 Am. & Eng. Ency. Law, 668.

§ 40. Settled that legal wrong, tort or breach of contract, cause for action. Hence at date of wrongful act, statute begins to run.

The settled doctrine established by the authorities is, that if there has been no fraudulent concealment the *legal wrong, whether it be a tort or breach of contract, constitutes the cause for action; hence that the date of the wrongful act is the one when the "cause arises," or the "right of action accrues," and from which the statute begins to run.* A few of the numerous adjudications expressly deciding these propositions, or in which they were the *ratio decedendi,* will briefly be stated.

§ 41. Leading English authority, in cause for negligence, held "misconduct" of the defendant "constituted cause of action."

The leading English authority was an action on the case in the court of King's Bench, to recover damages from an attorney-at-law for alleged negligence, by taking insufficient securities, in a transaction for which he had been employed by the plaintiff. The statute of limitations being the defense, it was held (1) that his "misconduct constituted the cause of action," and (2) that the statute began to run from the time the wrongful act was committed.[1] The case is one of such importance, and has been so generally followed, at all points, in this country, as to justify a presentation of the essential parts of the opinions. The first was by Baley, J., who said: "The only question is, *What is the cause of action disclosed in this declaration? It appears to me that the misconduct of the defendant is the gist of the action.* * * *The declaration is framed so as to show that the misconduct of the defendant is the cause of action.*" Then, giving what it stated as to his employment, duty thereunder, and breach thereof, it also is said: "Now, if the declaration had stopped there, a sufficient cause of action is stated. There is an acceptance of the retainer by the defendant, a duty resulting therefrom, and a breach of that duty. But the declaration goes on to state: 'By reason whereof the plaintiff has wholly lost the interest due on the sum of £3,000, and is likely to lose said principal sum of £3,000.' Now,

does the introduction of that allegation vary the case? In an action for words which are actionable in themselves, a special damage is frequently alleged in the declaration, although it is not the ground of action, and the plaintiff may recover without proving the special damage. In such case the allegation of special damage is a mere explanation of the manner in which the conduct of the defendant has become injurious to the plaintiff. So in this case, the purpose for which the allegation is introduced is precisely similar. Where, indeed, words are not actionable of themselves, but become so by reason of consequential damage, then it must be alleged and proved, because it constitutes the cause of action. In an action of assumpsit, the statute of limitations begins to run, not from the time when the damage results from the breach of the promise, but the time when the breach of promise takes place. * * It appears to me that there is not any substantial distinction between an action of assumpsit founded upon a promise which the law implies, that a party will do that which he is legally liable to perform, and an action on the case which is founded expressly on a breach of duty. *Whatever the form of action, the breach of duty is substantially the cause of action.* That being so, the cause of action accrued at the time when the defendant in this case took the bad and insufficient security." Holroyd, J., added: "*The cause of action is the misconduct or negligence of the attorney.* The statute of limitations is a bar to the original cause

of action, and to all the consequential damages resulting from it, unless, indeed, it can be shown that those damages, or any part of them, constitute a new cause of action which accrued within six years. I think it makes no difference in this respect whether the plaintiff elects to bring an action of assumpsit founded upon a breach of promise, or a special action on the case, founded upon a breach of duty. The breach of promise or of duty took place as soon as the defendant took the insufficient security. Whether the plaintiff, therefore, elect to sue in one form of action or another, the *cause of action, which is substantially the same, accrued at the same moment of time. The breach of duty, therefore, constituting a cause of action, it follows that the statute of limitations is a bar to this action,* unless the special damage alleged in the declaration constitutes a new cause of action. Fetter v. Beal (1 Salk., 11) is an authority to show that the special damage alleged in this case does not constitute any fresh ground of action, but that it is merely the measure of damage which results from the original cause of action. * * So, here the loss of interest does not constitute a fresh ground of action, but a mere measure of damages. *There is no new misconduct or negligence of the attorney, and consequently there is no new cause of action.*"

[1] Howell v. Young, 5 B. & C., 259.

§ 42. Another, that in assumpsit, "breach of contract" is the cause.

Howell v. Young was decided in 1826. In 1848, it was followed in a suit in chancery, for discovery, "it appearing by the bill that the cause of action had not arisen within six years before suit." [1] And in 1850, in an action of assumpsit, before the Privy Council, its doctrine was again affirmed. Lord Campbell delivered the opinion, which states the grounds of decision thus: "Upon the special counts of the declaration, the *cause of action disclosed is the refusal to deliver the residue of the salt purchased and paid for.* When did this accrue? From that point of time the statute of limitations began to run, and when once it began to run nothing could stop it, so that in six years thereafter the right of suit was barred. *The rule is firmly established that in assumpsit the breach of contract is the cause of action, and the statute runs from the time of the breach.*" [2] More than the prescribed period having elapsed, after breach and before suit, the bar of the statute was accordingly held good.

[1] Smith v. Cox, 6 Hare, 386.

[2] East Ind. Co. v. Paul, 1 Eng. L. & Eq. R. 44.

§ 43. English doctrine approved by Supreme Court of the United States.

Four years after Howell v. Young, a case on all fours with it came up in the Supreme Court of the United States. The action there,

however, was in assumpsit. At all points the doctrine of the English authority was approved. The court, in the opinion, say: "When might this action have been instituted is the question; for from that time the statute must run. When the attorney was chargeable with negligence or unskillfulness, his contract was violated, and the action might have been sustained immediately. * * In Howell v. Young (5 B. & C. 259) the same doctrine is affirmed, and the statute held to run *from the time of the injury, that being the cause of action.*" [1] As will be seen, Wilcox v. Plummer has been a leading case in this country—it, with the English adjudication, being generally followed on the propositions (1) that a breach of contract, or violation of legal duty, constitutes the cause for action, and (2) that from the time it occurs a right to action accrues, and the statute begins to run.

[1] Wilcox v. Plummer, 4 Pet., 172.

§ 44. This followed by many state courts.

So, where the defendants, employed to examine the title to certain lands certified it to be good in one B, from whom, on the faith of this, the plaintiff purchased the tract, and the title being found bad as to a part, brought a suit for damages. The statute of limitations was set up, and held to run against an action for "misconduct or negligence from the date when the misconduct or negligence was completed; and it is "immaterial whether the negligence out of

which the cause of action arises is the breach of an implied contract, or the affirmative disregard of some positive duty." [1] As in point, and to be followed, the Court in the opinion state: "In Wilcox v. Plummer, 4 Pet. 172, an attorney who had been employed to collect a note was guilty of such negligence that the indorser was discharged. It was held *that the ground of action against the attorney was the breach of his contract to act diligently and skillfully, and arose at the time he committed the blunder in issuing the writ,* and not at the determination of the suit. See, also, Howell v. Young, 5 B. & C., 259." And a still later case, following the same early decisions, holds that "if a searcher of records employed to make a correct abstract of public records affecting the title to real property, through his negligence or mistake omits an instrument from such abstract, *a cause of action against him is at once created, and the statute of limitations commences to run.*" [2] So, in another action for damages for false certificate of search, where the statute was a defense, the same doctrine is declared, the court saying: "The action is founded on negligence alone. Under the statute, then, the question is, *What was the cause of action, and when did it arise? Undoubtedly the cause was the issuing of the false certificate.*" [3] The case of Campbell v. Boggs adopts the doctrine laid down by Lord Campbell, that " in assumpsit the breach of contract is the cause of action," making it a ground of decision.[4] And in a suit against an attorney for neglecting to prose-

cute a claim until it was barred, the declaration alleging a breach of duty and special consequential damage, the same court held that "*the breach of duty, and not the consequential damage, is the cause of action.*" [5]

Again, it was decided that " in actions for official or professional negligence, *the cause of action is founded on the breach of duty which actually injured the plaintiff,* and not on the consequential damages." [6] So, in Schade v. Gehner,[7] it was held as "fairly well settled" law, that "*in actions on the case for negligence, the cause of action is the breach of duty.*" In a suit brought against a Register of Deeds, one question was as to the statute of limitations. The alleged default was in not indexing a certain mortgage. The court say: "The *breach of the bond—the failing to index the mortgage—was the cause of action.* It was not the damage." [8] Once more, it was decided that "when a person who wishes to purchase lands retains an attorney to examine the title, and such attorney reports to his client that the title of the person from whom he wishes to purchase is good, and it would be safe to purchase, and this report of the attorney is false, he is guilty of a breach of duty, and a right of action immediately accrues to the client. If no special injury or damage has resulted to the client, then he, nevertheless, may recover nominal damages; if special damages result from the conduct of the attorney, it is not of itself a cause of action; *the breach of duty imposed by the con-*

*tract is the cause of action; * * and the statute of limitations begins to run from the date of the breach."* [9]

[1] Lattin v. Gillette, 95 Cal., 317; 29 Am. St., 115.
[2] Russell v. Polk Co. Ab. Co., 87 Iowa, 233; 43 Am. St., 381.
[3] Owen v. Western S. B., 97 Pa. St., 47; 39 Am. R., 794.
[4] 48 Pa. St., 525
[5] Moore v. Juvenal, 92 Pa. St., 484.
[6] Kinneson v. Carpenter, 9 Bush, 599.
[7] 133 Mo., 259; 34 S. W. R., 576.
[8] State v. Grizzard, 117 N. C., 111; 23 S. E. R., 93.
[9] Lilly v. Boyd, 72 Ga., 83.

§ 45. Applied also in actions *ex delicto*.

All of the foregoing cases sprang from breaches of contract. Another class will now be referred to, in which, as in those above, the doctrine of Howell v. Young and Wilcox v. Plummer, that the statute runs from the date of the wrongful act, because the wrong constitutes the cause for action, was approved and applied. In a suit for damages from the defendant's alleged negligence and omission of duty, as a justice of the peace, the statute being a defense, it was held "to run *so soon as the injurious act complained of was perpetrated.*" [1] The court, in the opinion, state that "in Howell v. Young, 5 B. & C., 259, the same doctrine is affirmed, and the statute held to run *from the time of the injury, that being the cause of action.*" So, where the plaintiff alleged that he was induced to purchase certain premises by means of false representations on the part of

the defendant, it was held "that the cause of action arose immediately on the purchase," and hence was barred. The opinion says: "Suppose that the plaintiff, in the present case, had employed an attorney to search the title to McCarty's farm, and he, through his neglect, had not disclosed the Fellows mortgage, and the plaintiff had paid McCarty the full value of the farm without reference to the mortgage, when would the statute have begun to run in the attorney's favor? Would it not have been at the time when the plaintiff paid his money? (See Howell v. Young, 5 B. & C., 259; Short v. McCarthy, 3 B. & A., 626.) If that be so, would it have made any difference that the attorney falsely and fraudulently pretended that he had made the search when he had not? Certainly not. *The ground of action in either case would be for breach of duty; and that breach would be the same whether it was occasioned by negligence or fraud.*" [2] Again, in a case where the wrong complained of and the gravamen of the action was the transfer of certain judgments for half their value, it being alleged that this was brought about by the fraud and misrepresentation of the defendant (with another), and that the assignment was made at a date named, it was decided that *"the cause of action then accrued, and the statute began to run."* [3] So, in an action for not attaching sufficient property, as the defendant might have done, it was held to run from the return of the writ. The court, after fully stating the facts and decision in Wilcox v. Plummer, say: "From

a careful examination of that case, it will seem to be difficult to infer that the statute of limitations, in any case of nonfeasance or misfeasance, unaccompanied by fraudulent concealment, should be considered as beginning to run from any time, other than that at which the *act of nonfeasance or misfeasance actually took place. The substantive cause of action then takes place;* and whatever may follow or flow from it, is but an incident thereto, and must follow the fate of the primary cause." [4] So, in an action for damages, by the owner of a coal mine against a former lessee of an adjoining mine, from which he worked over onto the plaintiff, who, in ignorance of this, struck such working whereby his mine was flooded, the defense being the statute of limitations, the court said: "The decision of this case depends on what constituted the cause of action against the defendant, and when it accrued." The plaintiff claimed that it consisted of a private, continuing nuisance, and arose when the water from the old mine flowed into that of the plaintiff. It was held, however, *"that the cause of action against the defendant was for the trespass in working over his line,"* in which view the bar of the state was applied.[5] The ground of decision in this case manifestly is, that the wrong done by the defendant in working onto the adjoining lands—a technical tort—was the cause of action. For the general proposition, therefore, that it is the wrong which constitutes the cause, it is decisively in point. Except by citation it is not deemed necessary further to refer

to this line of cases. Suffice it to say, then, that the overwhelming weight of authority sustains the doctrines declared, and held to be the law, in those which have been examined.[6]

[1] Kerns v. Schoonmaker, 4 Ohio, 331; 22 Am. D., 757.

[2] Northrop v. Hill, 57 N. Y., 356.

[3] Wood v. Carpenter, 101 U. S., 138.

[4] Betts v. Norris, 21 Me., 314; 38 Am. D., 270.

[5] Williams v. Pomeroy C. Co., 37 O. St., 583.

[6] "In cases of *tort* and in actions on the case sounding in tort, a distinction is to be observed between acts wrongful in themselves, which directly affect the rights of the plaintiff, and for which, therefore, an action may be instantly maintained without proof of actual damages, and those cases where the injury is consequential, and the right of action is founded on the special damages suffered by the plaintiff. In the former class of cases the statute begins from the time the *act* was done; * * in the latter cases, it runs from the time when the special *damage* accrued. * * And in actions for official or professional negligence, the *cause of action is founded on the breach of duty which actually injured the plaintiff,* and not on the consequential damage. * * In cases of contract, * * though special damage has resulted, yet the limitation is computed from the time of the breach, and not from the time when the special damage arose." 2 Greenl. on Ev., §§ 433, 435. Could there be a clearer recognition of the doctrine that in all the cases referred to, the violation of legal right, whether in tort, or by breach of contract, is the wrong which constitutes the cause for action, and so puts the statute into operation? To me, it seems not. Brown v. Howard, 2 B. & B., 73; Bank of U. v. Childs, 5 Cow. 283; Argall v. Bryant, 1 Sand., 98; McMullen v. Rafferty, 89 N. Y., 459; Lathrop v Snellbaker, 6 O. St., 276; Snedicor v. Davis, 17 Ala., 481; Chig. Ry. Co. v. Maker, 91 Ill., 312; Scovill v. Thayer, 105 U. S., 153;

Cochrane v. Oliver, 7 Ill. App., 176; White v. Reagan, 32 Ark., 281; Wilder v. Secor, 72 Iowa, 161; 2 Am. St., 236; Pope v. Pollock, 46 O. St., 367; 15 Am. St., 608. It would not seem to need argument to show that what constitutes a cause for action, which will start the statute of limitations to running, is the "cause" for every purpose. At all events, the authorities examined and cited presuppose that proposition. On the other supposition, a cause for action would be one thing if the statute were pleaded, and another in case it was not—a manifest absurdity. Or, take a suit such as often occurs, in which it is interposed, and there is another separate defense, to an alleged breach of contract. By the notion that the cause is different under the statute, such an answer obviously would make two causes of the one upon which the action was founded.

(*b*) On What is the Crime in Homicide.

§ 46. States may fix places for trial of crimes. Local, by the common law.

It is a familiar principle of our criminal law that, while the governing power in a country may determine where the perpetrator of a crime shall be tried, yet with us, in the absence of other provision, the rules of the common law prevail, under which crimes are local, and so must be prosecuted in the county where they are committed; since there only can a grand jury inquire of them.[1]

[1] 1 Bishop New Cr. Proc., §§ 45-47; Gut. v. State, 9 Wall., 35; Green v. State, 66 Ala., 40; 41 Am. R., 744.

§ 47. Locality of crime, and jurisdiction to prosecute.

The application of the doctrine that offenses have locality, especially in cases of homicide, has compelled an inquiry into and decision of what constitutes the crime, in a felonious killing. In some instances the mortal blow would be given in one county or state, while the death occurred in another. On that state of facts where, in law, was the offense to be deemed to have been committed? Evidently, upon the answer to this inquiry, in the absence of statutory provision, depended the jurisdiction over it, and consequently the authority to prosecute the felon.

§ 48. Solution of problem by rule that wrongful act is the offense.

Either of three solutions of the problem which such a case in the first instance presented was possible. First, the blow and death together might be regarded as constituting the crime, the result of which would be, at common law, that neither of the two counties in which these separate events happened could take jurisdiction; and at one time this view was entertained by some. Then, the death could be considered as the offense, and so the jurisdiction attach in the county where it occurred—a conclusion supported by a few authorities. But against all this, the doctrine now established, as founded in reason, and almost universally prevailing, is, in the words of Mr. Bishop,

"that the infliction of the mortal blow constitutes the crime of felonious homicide." [1] The death is not a part of the *offense,* but evidence simply of the mortal nature of the *injury.* Hence, the place where the wrongful *act* was done, determines the *locus* of the felony, and so generally, the jurisdiction to punish it.

[1] 1 Bishop's Cr. Law, § 115, note; New Cr. Proc., § 49. "The giving of the blows which caused the death constitutes the felony." Patterson, J., in Rex v. Hargrave, 5 Car. & P., 170.

§ 49. This supports doctrine that the legal wrong is cause for action.

The weight of authority for the proposition that in murder, the mortal blow or injury constitutes the crime, puts it beyond serious controversy. Taken as law, however, two things irrefragably follow. First, that the stroke, or other mode of causing death, as an act violative of primary rights, is *per se* the legal wrong; and secondly, this wrong, and it alone, is the cause for action against the guilty party. Hence the proposition (1) that the *act* by which a primary right is infringed is in legal contemplation the *wrong;* and (2) that the *wrong* is in law the sole *cause* for action, in effect if not in formal statement, has the support of every case which holds that a mortal blow is the crime in felonious homicide. From this, certainly, there can be no escape.

§ 50. Cases illustrating that view in criminal prosecutions.

A few of the authorities will be presented, in order that the conclusions drawn from what they decide may be made distinct and clear. At common law, according to Lord Hale, "The more common opinion was" that the party "might be indicted where the stroke was given"; and in 1491 it was so held, Tremaile, J., saying: "It seems not material where he died, for the striking is the principal point, but it requires death; otherwise it is no felony; but whether he died in one place or another is not material." [1] In a modern English case the exact point was ruled, on a statute under which a civil liability was asserted. It made the inhabitants of every "rape or lath in counties so divided," liable in the sum of £100 to the personal representative of any person killed therein, in enforcing the act against smuggling. The Executor was held entitled to recover, his decedent having "received a mortal wound by a shot fired by a person on the shore within the lath, though the officer afterward died on the high sea beyond the low water mark, and consequently out of the lath." [2] So, it explicitly has been decided that the *"crime of murder is committed at the time the fatal blow is struck."* [3] And an information for that offense on this ground was held sufficient, which charged the giving of the blow in the county wherein the prosecution was had, and the fact of ensuing death, although it failed to allege where that event took place.[4] So,

when a fatal shot was fired in the District of Columbia, it was decided to be murder, although the death occurred outside of the District.[5] Upon this principle, a statute authorizing a prosecution for that crime, in the county where the fatal blow was struck, when the victim dies out of the state, was held valid.[6] Finally, it has been decided that where a blow is stricken in one county, and the party injured dies thereof in another, the offense was committed in the county in which the blow was given.[7] These cases sufficiently show the general doctrine, and illustrate its application in prosecutions for crimes.

[1] Lang's Case, Y. B., 6 Hen. VII, 10.
[2] Grosvenor, Ex., v. St. Augustine, 12 East, 244.
[3] People v. Gill, 6 Cal., 637.
[4] State v. Bowen, 16 Kas., 475.
[5] U. S. v. Guiteau, 1 Mackey, 498; 47 Am. R., 247.
[6] Green v. State, 66 Ala., 40, 41 Am. R., 744.
[7] Riley v. State, 9 Humph, 646; State v. Kelley, 76 Me., 331; 49 Am. R., 620; Ex parte McNeeley, 36 W. Va., 84; 32 Am. St., 831; State v. Foster, 8 La. Ann., 290; 58 Am. D., 678; State v. Hollenbeck, 36 Iowa, 112; Moore v State, 37 Tex. Crim., 552; 4 S. W., 287.

(*c*) Other Cases — I. That the Wrong Is.

§ 51. Adjudications on the point.

A leading case here is Veeder v. Baker.[1] This was a suit to recover a debt due to the plaintiff from a corporation. A statute of New York required all companies organized under it to file at certain times in the county where located and

publish a report of their condition, signed by the President and other officers. It also was provided that if the report was "false in any material representation, all the officers who shall have signed the same, knowing it to be false," should be liable for the debts of the company, contracted while they were in office. The action was against the President of such a company to collect one of its debts from him, on the ground that he had signed a false report, made under this statute. The debt was created in one county and the report filed in another. Suit was brought in the county where the debt arose. The defendant disputed the jurisdiction there, by a motion to transfer the case for trial to the county where the report had been filed. This was overruled. Upon the question thus made, the action went to the court of appeals. With respect to jurisdiction, the Code provided that cases should be tried in the county "*where the cause of action or some part of it arose.*" The contention of the plaintiff was, that as the debt had been made in the county where he began his suit, a part of the cause arose there, and therefore it was well brought. The court, however, held otherwise. In the opinion they say: "The statute imposes upon the officers of such a company, as a penalty for a false report, liability for the debts of the company. * * This cause of action arose in Monroe County. The false report was there made and filed, and the penalty there incurred. The learned counsel for the plaintiff, however, claims that, as the debt against the company

had its origin in St. Lawrence County, some part of the cause of action arose there. But the defendant was not primarily liable for that debt. He did not create it, or in any way obligate himself to pay it. The cause of action against him is the false report, and nothing else. * * The false report, *the wrong of the defendant, gives the plaintiff the right to enforce the penalty.* It is true that the plaintiff, to sustain his action, must prove not only the false report, but the debt against the company. This is so because the statute imposes no specific penalty for its violation." On these grounds, the judgments below were reversed, for want of jurisdiction in the trial court. Evidently, this decision, like those upon the statute of limitations, wholly repudiates the doctrine of some English cases—that the cause for action "means every fact material to be proved to entitle the plaintiff to succeed." It plainly grounds the right to sue solely upon the "wrong" done by joining in the false report, though conceding that no action could be maintained without proof also of the debt. That is, notwithstanding this was indispensable to a recovery, it constituted no part of the cause for action. By parity of reasoning, therefore, in suits upon contracts, the "cause" must be found in the breach alone, as that constitutes the "wrong" in such cases. Proof of the agreement is necessary only as a predicate for this —to show that a right under it was violated by what was done—but not as any part of the cause for action.[2] In principle, then, this is a strong

authority for the doctrine that the cause resides solely in a legal wrong, and never in the facts which are but the conditions to this. To the same effect is Dunham v. Spence,[3] in which it was held that "where a promise of marriage was made outside of England, and the breach took place in England, the cause of action arose" there. So, "where a contract is made at one place, and is to be performed at another, the cause of action on such contract arises at the latter place"; which, manifestly, could not be the case unless the wrong done by its breach was itself the "cause."[4] Again, where in the opinion of the court the question became material, it expressly is ruled that "*a cause of action is a wrong committed or threatened. It may consist of the wrongful conversion of property of the nonperformance of an agreement.* In the one case the action would sound in tort, the other in contract."[5] And breach of agreement was held to constitute the cause for action under a statute providing that a court could entertain suit upon a cause of action arising within or in respect to the breach of a contract, within its jurisdiction.[6] Slade v. Noel[7] makes the same holding on a claim for demurrage which arose from the breach of a foreign charter party. An able note to that case says: "As regards contracts made in one country to be performed in another, the *breach or nonperformance is the cause of action, and arises where the breach took place, or where performance was to be.*" Obviously, in reason, and on principle, this must be true also in

respect to agreements to be performed where they are made. Hibernia N. B. v. Lacombe,[8] presented a question of jurisdiction depending upon whether or not the cause for action arose in New York; and this compelled the court to decide what, in a suit for breach of contract, constitutes the cause. The action was on a check drawn in New Orleans in favor of the plaintiff, and payable in New York City, where it was presented, and payment being refused, protested, with notice to the drawer. The court, in the opinion, say: "The complaint in this case sets out the check, shows the performance of those things which the law merchant prescribes as necessary to be done to change the conditional liability of the drawer into an absolute one, and that the proper steps were taken to change it. There are thus placed before us two classes of facts: first, the contract and its obligations; second, the things done in pursuance of the contract. The argument for the appellant assumes that the first constitutes the cause for action, and as the contract was made in Louisiana, therefore excludes jurisdiction from our courts." The adjudications are then reviewed, with this result: "We conclude, therefore that the cause of action in the case before us arose where the draft, by its terms, was payable, when payment was refused and notice given; *these things constitute a cause of action, and it has arisen in this state.*" Dunham v. Spence (L. R., 6 Exch., 46) is cited as authority for this holding, and passages from the opinions in that case approvingly quoted.

Cleasby, B.: "The cause of action arises when that is not done which ought to have been done; or that is done which ought not to have been done. But the time when the cause of action arises determines also the place where it arises, for *when that occurs which is the cause of action, the place where it occurs is the place where the cause of action arises.*" So, Pigott: "I understand by cause of action that which creates the necessity for bringing the action. No doubt to make the act or omission complained of a cause of action, a contract must have preceded; but so also a negotiation must have preceded the making of the contract. Yet I should not include that negotiation, *nor any of the other circumstances that might form part of the necessary evidence in the cause, as the ground work of the cause of complaint, but only the cause of complaint itself; that is, the breach.*" It scarcely needs to be said that the effect of these authorities is to make the legal wrong done by breach of contract the cause for action in a suit upon it. Both stand on that as a general proposition of law, and not because by the statutes under consideration the court in either case was required to or did give to the term "cause" any other than its ordinary legal import, when used with reference to a ground for judicial action. But the latest case in point is from Minnesota.[9] This holds that injuries to the person and to the property of a party, by a single wrongful act, constitute "but one cause of action." The trial judge had ruled the contrary, following Mr.

Pomeroy's view that a violated primary right is an element of the cause, the logical result of which would be to make two distinct causes of action in the case, inasmuch as two separate primary rights had been infringed. The Supreme Court reversed the judgment below, after reviewing the authorities and discussing the principles involved, upon the ground, stated in the opinion, "that the cause of the action consists of the negligent *act* which produced the effect, rather than in the *effect* of the act in its application to different primary rights, and that the injury to the person and property as a result of the original cause gives rise to different items of damage." This plainly sustains the proposition (1) that the act which violates a primary right is the legal wrong, and (2) that it *per se* constitutes the cause for action. Consequently, on principle, and as necessarily deciding a crucial point against Mr. Pomeroy's view, this case fully sustains the doctrine herein maintained. What it holds, therefore, entirely accords with the great body of adjudications respecting the limitations of suits, as well as those which decide that the mortal blow is the crime in murder. These, then, with the other cases supporting it, show an overwhelming weight of judicial authority for the proposition that a legal wrong is always the true cause for action, civil or criminal. Failure to examine them, coupled with defective analysis, must be what, in some instances, has led to a contrary conclusion.

[1] 83 N. Y., 156.

[2] Hibernia N. B. v. Lacombe, 84 N. Y., 367; 38 Am. R., 518.

[3] L. R., 6 Exch., 46.

[4] Burckle v. Eckhart, 3 N. Y., 132.

[5] Miller v. Hallock, 9 Cal., 551.

[6] Jackson v. Spittall, L. R., 5 C. P., 542.

[7] 4 Fost. & Fin., 424; Fife v. Round, 6 Week. R., 283

[8] 84 N. Y., 367.

[9] King v. Chicago, M. & St. P. Ry. Co., 80 Minn., 83; 81 Am. St., 238; 50 L. R. An., 161. An able note in the latter volume shows that the "rule basing the *cause* of action on the *act* causing the *injury,*" is "supported by the greater weight of American authority." Balt. & O. Ry. Co. v. Ritchie, 31 Md., 191; Chic. W. D. R. Co. v. Ingraham, 131 Ill., 659; Segar v. Bookhounsted, 22 Conn., 295; Braithwait v. Hall, 168 Mass., 38; Chapman v. Rochester, 110 N. Y., 276. After referring to those and other authorities, the note adds: "The theory of this rule is that a single wrongful act can give rise to but one cause of action, though it may result in different injuries, or injuries to different rights, as the *cause of action grows out of the act itself, and not out of its results.*"

II. As Against that View.

§ 52. Cases supposed to be, but which are not.

In a Michigan case, Cooley, J., said: "The elements of a cause of action are, first, a breach of duty owing by one person to another, and second, a damage resulting to the other from the breach. Damage where no duty is violated is *damnum absque injuria;* a neglect of duty, where no loss occurs, is equally incapable of giving a right of action." [1] The first thing here to be noticed is that the antecedent or primary right is

excluded from consideration—entirely left out of account—by the fact that the "cause" is wholly found in a breach of legal duty, and the damage consequent thereon. This authority, then, is palpably against Mr. Pomeroy's view. But that is not all. Save as it makes damage an "element" of actionable injuries, or, what is the same thing, legal wrongs, it manifestly supports my contention. For very clearly what in the estimation of this distinguished jurist would constitute a wrong, in law, if put in that form of expression, is by him here made the cause for, and a ground of, the right to action. This is obvious upon the mere statement. Hence, like Veeder v. Baker, *supra,* cited in support of the contrary claim, so far as it touches the point in discussion, its force is the other way. The same may be said of Foot v. Edwards,[2] also supposed to be against the doctrine herein advocated. The action was to recover damages for an injury to the mill property of the plaintiffs, situate in Massachusetts, by the diversion of a stream of water upon which it stood. the act causing the diversion having been done in Connecticut. The question made was raised by a demurrer to the declaration, and is stated, as is the decision, in the opinion of the Court, which says: "The rule is well settled that an action on the case for diverting a water-course must be tried, if brought before a state court, in the county where the cause of action arose. * * But it is denied by the defendant that a state court in the county where the diversion took place, the land

injured not being in such county, or that a Federal court in the state where the diversion took place, the land injured not being in such state, can take jurisdiction of such a case. It being well settled that in a case of this kind the suit must be brought where the cause of action arose, it becomes essential, in order to determine whether this suit has been brought before the proper court, to determine what is the cause of action. An action is the 'lawful demand of one's rights.' The cause of this lawful demand, or the reason why the plaintiff can make such demand, is some wrong act committed by the defendant, and some damage sustained by the plaintiff in consequence thereof. No one of these facts by itself is a cause of action against the defendant. The wrongful diversion, then, of the water of the stream in Connecticut, by the defendant, and the consequent damage which the plaintiff's mill in Massachusetts has sustained, constitute the cause of action. A part of that which is essential to the plaintiff's right to recover took place in Connecticut. Without the commission of the act of diversion in Connecticut there would have been no good cause of action. With it, there is a sufficient cause of action. The act of diversion, which arose in Connecticut, and the other facts existing, give the plaintiffs a cause of action. *That which is essential, therefore, to the plaintiffs' right of recovery against any one, or their cause of action, arose where the suit has been brought.*" While the expression of it is a little obscure, the assumed ele-

ments of an actionable injury being treated as the essentials of the cause for action, it becomes pretty clear at the last that the wrong done by diverting the water was regarded as the real "cause." On that ground, the place of the tortious act settled the question of jurisdiction—constitutes the basis upon which the decision upholding it, beyond controversy can stand.[3]

[1] Post, Adm'r v. Campau, 42 Mich., 90. This case was a little singular in one feature. Justice Cooley delivered the opinion and somewhat lengthily expressed his "own views" on a question that he says the majority of the court thought was "not involved"—whether the "ordinary covenant against incumbrances would or would not be broken finally, if at all, at the delivery of the deed containing it." His observations, therefore, respecting the cause for action carry the weight only of *dicta;* yet as such, they are worthy of careful consideration. Following what is in the text, he says: "Every man owes to his surety the obligation to pay the debt when due, but the failure supports no action till the surety is damnified." This, surely, is not a happy illustration; for while it is true that an action at law can not be maintained, it seems to be equally well settled that a failure of the principal to pay, *per se* operates to give the sureties a right at once to proceed in equity and compel him "to exonerate them from their liability, by paying the debt." (1 Story's Eq., §§ 327, 730; Stump v. Rogers, 1 Ohio, 533; 1 Am. D., 48, note; McConnell v. Scott, 15 Ohio, 401; Horst v. Dague, 34 O. St., 375; Washington v. Jait, 3 Humph., 543; Bishop v. Day, 13 Vt., 81. And if this is so, it must be because the default of the principal was a breach of duty to the surety that in legal view constitutes a wrong, which in equity is a good cause for action against him. In other words, before the surety pays, it is a question as to the mode of remedy, but not of right to it. After

payment he may recover from the principal, while prior to that he is limited to a judicial compulsion upon him to pay—an obviously just state of remedial right, in such cases. But the opinion proceeds; "there are some cases in which the award of merely nominal damages is perfectly consistent with this rule, either because the party has other substantial redress, or because the nominal damages cover all that are suffered, and answer as a preventive by way of warning against further injury. An example of the first class is where a plaintiff in replevin, after obtaining his property, and establishing his title, obtains only nominal damages. Examples of the second class are had in cases of technical trespass for distinct invasions of right, and where the award of costs has its effect by way of warning, and the judgment itself may establish a right before in dispute." Thus it becomes apparent that the "elements" of an actionable injury were in mind; which clearly resolves itself into the question of what constitutes a legal wrong. This, as Professor Robinson felicitously states, "is the failure to discharge a legal duty, and consequently consists in some act or forbearance in violation of a legal right." (Elements Am. Jur., § 139.) But, as Mr. Broom says, "the existence of a right may have to be proved by an appeal to elementary principles and by deductions ingeniously drawn from them, by a discussion of general doctrines of public policy, or by embarrassing inquiries touching the intention of the legislature." (Com. on C. L., 653.) That clear, however, what he terms "the great case of Ashby v. White, is precisely in point, as showing clearly that it is *actionable to deprive a man of a right given him by law, although no damage, loss or injury has been thereby occasioned.*" (Ibid, 86.) Yet there are instances where the question whether or not a *right has been infringed,* is made to depend upon actual damage to the complainant; as, for example, suits in libel or slander, for words not *per se* actionable. So, of actions for fraudulent representations upon which one has acted. (Wynne v. Allen, 7 Baxt., 312; 32 Am. R.,

532. See also Bonomi v. Backhouse, 9 H. L. Cas., 503.) When, however, the right is clear, and its violation proved, a legal wrong appears which becomes of itself a cause for action, though the damage which the law imports from this "does not cost the party a farthing." (Broom's Com., 87; Marsh v. Billings, 7 Cush., 322.) And since 1826, in England, and generally in this country, it has been held that in an action for negligence, or breach of contract, the *cause for action is the breach of legal duty alleged.* (Howell v. Young, 5 B. & C., 259; East Ind. Co. v. Paul, 1 Eng. Law & Eq., 44; Wilcox v. Plummer, 4 Pet., 172; Kerns v. Schoonmaker, 4 Ohio, 331; 2 Greenl. on Ev., Sec. 433.) Evidently the principle here is that the legal wrong constitutes the cause; and the case is not different with respect to that class of wrongs which consist in the doing of actual damage. This is simply one mode of violating a legal right, and consequently of committing a legal wrong. The only difference with this learned judge—immaterial to the question in discussion—relates to the correctness of putting all cases of actionable injury into one category. That this can be done, either upon principle or authority, well may be doubted.

In the introduction to an edition of Stephens on Pleading, by Mr. Andrews, which I failed to see until the foregoing was written, is this: "It has been said that a cause of action must include both an injury and a case of damage; but if in truth the plaintiff has sustained an injury—that is, if his right of personal security, or right of private property, has been infringed, it is not necessary in all cases that there should be appreciable damage in order to maintain an action. For every infringement of the right of personal liberty or personal security the law imports damages; and wherever the infringement of the right of property is of such a nature that its continuation might ripen into a claim of right upon the part of the perpetrator, or furnish evidence in derogation of the right claimed, the maxim *De minimis non curat lex,* does not apply. It would avail nothing

in such cases to plead that the plaintiff was benefited." (§ 11.)

[2] 3 Blatch., 310.

[3] After what has been extracted from the opinion, Bulwer's Case, (7 Rep., 57), is referred to, and this passage quoted: "If a man doth not repair a wall in Essex, which he ought to repair, whereby my land in Middlesex is drowned, I may bring my action in Essex, *for there is the default, as it is adjudged in* 7 H., 4-8.; or I may bring it in Middlesex, for there I have the damage." This touches a question of venue, but also clearly supports the proposition that the neglect to repair—a breach of legal duty, described as the "default"—was the ground of, or cause for, action. (Rundle v. D. & R. Canal, 1 Wall., Jr., 275.) That constituted the wrong in the case, and while the consequential damages accruing elsewhere were material to the other point, the action is one in which they could not be part of the "cause" therefor (Howell v: Young, 5 B. & C., 259; Wilcox v. Plummer, 4 Pet., 172.)

§53. Some English cases, *contra*.

A few English cases assert a different doctrine from that maintained in this work. Cook v. Gill[1] may be taken as an illustration. There, it is said that the "cause of action has been held from the earliest times to mean every fact which is material to be proved, to entitle the plaintiff to succeed—every fact which the defendant would have a right to traverse." Again, by Pollock, Ch. B: "It has been laid down in an analogous matter that the term 'cause of action,' means the whole cause of action. Here, the cause of action is the contract and breach of it."[2] In another case, Maule, J.: "Everything that is requisite to show

the action to be maintainable is part of the cause of action." [3]

[1] L. R., 8 C. P., 116.

[2] Sichel v. Borch, 2 H. & C., 954.

[3] Borthwick v. Walton, 15 C. B., 501. See, also, Read v. Brown, C. B. Div., 128; Buckley v. Hann, 5 Exch., 43.

§ 54. These against other English authorities and not based on principle.

The first thing to be observed with respect to the foregoing and similar cases, is that they are in the teeth of Howell v. Young and East India Co. v. Paul, both of which hold and make the proposition a ground of decision that in respect to contracts the breach alone constitutes the cause for action. The statement of fact, therefore, on which some of the learned judges in the cases referred to predicate their rulings, is inaccurate—important adjudications of the precise point were unknown or ignored—a circumstance which must detract greatly from the weight of these holdings. It also will be observed that in none of them is there any attempt to analyze the question, or to put the decision made on grounds of legal principle. Hence, while they may be the later English precedents, in view of the approval in this country, where the point arose, of the doctrine of Howell v. Young, it will carry far the greater weight—especially as the decision there is on principle unquestionably sound.

§55. Certain American cases support doctrine of Pomeroy merely by *dicta*.

There are a number of American cases which have been cited for the proposition that the *delict* alone is not the cause for action. Three of these were considered above, and all of them found to be authority in support of a contrary view. In none of the others did the point become necessary to the decision made. The opinions in some instances quote, with approval, the views of Mr. Pomeroy in his "Remedies," but under circumstances which give the expression the force only of *dicta*.[1] The doctrine of Howell v. Young, therefore, that the wrong done by a breach of contract, or of a legal duty, constitutes the true cause for action, approved as it is by the weight of authority above shown, should prevail. It gives a principle which runs through the law of procedure, civil and criminal, besides having the solid ground furnished by a correct analysis of legal rules and conceptions in respect to which there is no controversy.[2]

[1] For example, Hayes v. Clinkscales (9 S. C., 441). This quotes Mr. Pomeroy, on the cause for action, but involves no point touching the correctness of his views.

The same is true of Rodgers v. Mutual E. A. Assoc. (17 S. C., 406.) However, it refers to Story's Conflict of Laws for the proposition that, when a contract is made in one place, to be performed in another, "the cause of action upon such contract arises at the latter place"; the effect of which is to *make the breach the cause*. (Hibernia N. B. v. Lacombe, 84 N. Y., 367.) Warwick v. Hutchinson (45 N. J. L., 61), was an action for indemnity. The decision went

against the plaintiff, because his damages were "not in any legal sense due to any act by the defendant." The court say: "It is a fundamental principle of law, applicable alike to breaches of this description and to torts, that in order to found a right of action, there must be a wrongful act done and a loss resulting from that wrongful act. The wrong done and the injury sustained must bear to each other the relation of cause and effect; and the damages, whether they arise from withholding a legal right or the breach of a legal duty, to be recoverable, must be the natural and proximate consequence of the act complained of." This evidently relates to the question of actionable injury, and therefore, properly regarded, to what, in the instances specified, would constitute a legal wrong. Hence, (1) the comments upon Post v. Campau, *supra* (Sec. 43, note 1), apply, and (2) in so far as it is pertinent, the case tends to the view that the wrong is the cause for action. Hutchinson v. Ainsworth (73 Cal., 452; 2 Am. St., 823), decides nothing beyond the proposition that an "action to foreclose a mortgage, and to reform the certificate of acknowledgment of a notary thereto, states but one cause of action." The decision stands as well upon the Bliss view of what constitutes its cause, as the other; consequently, is no authority for either. So, of Wildman v. Wildman (70 Conn., 700; 41 At. R. I.). The sole question there was as to the bar of a former action. A majority of the court held it good. The opinion says: "An inspection of the record in this action, and a comparison of its averments with the record in a former one, show that this action is between the same parties as was the former one, and that in each action the parties are litigating in the same right, the plaintiff as the owner of certain lands—the same in the former action as in this one—and the defendant in her individual right; that the sole delict or wrongful act of which the plaintiff complained in the former suit, and the main delict of which he now complains is the same in this action as in that." On this basis of fact the case was decided. While the opinion quoted with apparent

approval Mr. Pomeroy's views respecting a cause for action, and *also* Veeder v. Baker (83 N. Y., 156), which holds the Bliss doctrine, it is too obvious for comment, that the point neither did nor could arise in the case. In Atch. & S. F. Ry. Co. v. Rice (36 Kan., 593), the court remark: "The elements of any cause of action are, (1) a right possessed by the plaintiff; (2) an infringement of such right by the defendant." Nothing in the case required this, and its decision stands just as well upon the proposition that the wrong alone is the cause, as on the one stated. But beyond this, it is clear that the learned judge had in mind the elements of an actionable injury—a legal wrong. What he says exactly accords with Prof. Robinson, when he states that a legal wrong "consists in some act or forbearance in violation of a legal right." (Elements Am. Jurisp., § 139.) Thus the *dictum,* analyzed, sustains, rather than opposes, the view that the wrong alone is the cause for action. So, Wurlitzer v. Suffe (38 Kas., 31). The only question there was as to a misjoinder of causes of action, growing out of the fact that with matured notes, an account not due had been united. The opinion says: "To constitute a cause of action in cases of this character, there must be a duty to be performed; a right to be enforced, and a failure, omission or refusal to perform, or an infringement of the right. On an account not due these elements are wanting. *There is no failure, or refusal to pay.*" Hence, there could be no cause for action on the account, and for that reason it was held to be improperly joined with those upon the notes. But it is too obvious to escape notice, (1) that, as in the preceding case, the elements of an actionable injury were in mind, and (2) that the decision rests equally as well upon the view that the legal wrong alone is the cause for action, as on that which was expressed. The latter, therefore, is pure *dictum,* in so far as it even formally conflicts with the former. This disposes of the American cases, which have been supposed to support what may be termed the Pomeroy doctrine as to what constitutes the cause for action,

and clearly leaves the Bliss view untouched, except by such force as is to be given to mere *dicta*—made without the light of a full analysis of the subject, or any consideration of the great weight of authority to the contrary. Rightly regarded, indeed, some of these cases are against the proposition to which they have been cited—as it seems to me has been shown.

[2] While reviewing the text Mr. Fitman's able work on trial procedure under all the codes, has fallen into my hands. This is so strong in statement, and so fully sustains the principles herein set forth, as to justify the transcribing of what he says. It is as follows: "Generally, it may be said that a 'cause of action' exists where the legal rights of a party have been invaded by another. It follows, therefore, that the plaintiff must allege in his complaint all the facts which show his right, and also the facts showing the invasion by defendant of that right. The facts alleged must in law, upon their face, show him entitled to the right he claims, on the one hand, and, on the other, that the acts of defendant complained of amount to an invasion of that right. (Chalmers v. Glenn, 18 S. C., 471.) A *cause of action is the defendant's wrongful act done or threatened in violation of some right of the plaintiff,* by which damage or injury has accrued to the plaintiff, or is liable to accrue to the plaintiff if done, for which damage or injury plaintiff is entitled to relief in a court of justice. It is not the remedy which the plaintiff may be entitled to apply for the correction of the *injury which constitutes the cause of action.* The remedies to which the plaintiff may be entitled for one and the same cause of action may be several and diverse. *But a single wrongful act, causing or threatening injury to the plaintiff's right,* with all its subsidiary accompaniments constitutes but one cause of action." (§ 401.) And Mr. Tyler, in his Dissertation on Parties, prefixed to the edition by him of Stephens on Pleading, says: "Causes of action consist either of *breaches* of contract, or of *injuries* to the person, or to character, or to property." (P. 25.)

CHAPTER VIII.

CAUSE — SHOWN IN PRECEDENTS.

§ 56. Doctrine that legal wrong is only cause for action, illustrated by precedents. This of value to students, and aids in perceiving scope of the principle.

As illustrating the scope and application of the doctrine that the legal wrong, evinced by facts properly stated, constitutes, and in all cases is, the true cause for action, it has been deemed well to give and briefly call attention to a few precedents. This, at least, will prove serviceable to students, and as the subject never has been thus presented in the books, may have its suggestive value to the practicing lawyer. My observation is that the conception of pleading, by which the same principles are seen to apply in setting out the facts which show a cause for action in an indictment, declaration at law, bill in chancery, and libel *in rem* in admiralty, is not always clearly apprehended. Still, as it appears to me, due consideration of the matter will make the truth of this apparent. Moreover, it may become more palpable, if seen in concrete form, by supposed cases.

§ 57. Cases of indictments first giving assault and battery. Larceny. Libel. State, plaintiff. Pleads by the indictment. Bad, if it fails to show acts which constitute a public wrong.

For the purpose now in view the indictments in three instances of public wrongs are taken under the laws of Ohio. The first is set out in all its parts; the two following, only as to introductory matter, and the facts averred which show the offense, or wrong.

1. The State of Ohio, Washington County, ss.: In the Court of Common Pleas within and for said county, of the Term of May the tenth, in the year of our Lord, one thousand nine hundred and ninety: The jurors of the grand jury of said state, within and for the body of said county, impanelled, sworn and charged to inquire of crimes and offenses committed therein, on their oaths do find and present that Jabez Nix, at the County of Washington aforesaid, on the fourth day of April, in the year of our Lord, one thousand nine hundred and ninety, *unlawfully did make an assault upon one John Doe, and him, the said John Doe, then and there did unlawfully beat and strike*, contrary to the statute in such case made and provided, and against the peace and dignity of the State of Ohio.[2]

2. With the caption and conclusion above, a charge of larceny may be stated as follows:

The jurors of the grand jury of said State, within and for the body of said County, impanelled, sworn and charged to inquire of crimes and offenses committed therein, on their oaths do find and present that John Doe, at the County of Washing-

ton aforesaid, on the fifth day of March, in the year of our Lord one thousand nine hundred and ninety, *unlawfully did steal, take and carry away one silver watch of the value of twenty dollars, the personal property of David Jones.*

3. So a charge of criminal libel can be set out thus:

The jurors of the grand jury of said State, within and for the body of said county, impanelled, sworn and charged to inquire of crimes and offenses committed therein, on their oaths do find and present that Moses Dix, at the County of Washington aforesaid, on the third day of April, in the year of our Lord, one thousand nine hundred and ninety, *unlawfully and maliciously did write, print, and publish a certain false and malicious libel of and concerning one Ichabod Roebuck, which said false and malicious libel is as follows, that is to say: "He," meaning the said Roebuck, "is the man who broke into my barn and stole my cow."*

To see the point here in view, in its true light, it is to be remembered that the State is a plaintiff in all indictments; that the party against whom one is found, is a defendant; that the indictment charging him with an offense, is in that form a pleading which he is called upon to answer. Now, if it fails to show by facts set forth therein that what the defendant is alleged to have done is a violation of law—that is, a public wrong—then it is bad on demurrer, exactly as a declaration or petition in a civil suit would be, in which no cause for action is averred. This will become still more obvious, if that be possible, in what follows.

§ 58. General doctrine further illustrated by supposed civil suits for the same wrongful acts.

The italicized parts of the three supposed indictments state the facts which show the *wrongs* charged, and therefore the several *causes* for action, against the parties therein named. But in each of these cases, the *act* which constitutes a *public* wrong, is also a *private* wrong to the persons injured thereby, for which they may have redress in a civil suit. Now, that the facts essential to show a cause for action are substantially the same, whether the wrong-doer be prosecuted civilly or criminally—that it is based wholly on the violation of some legal right, and is therefore a legal wrong, simply—becomes very plain by what must be stated in a declaration or petition, by parties injured, to entitle them to a recovery.

1. In the case first given, Jabez Nix is charged with committing an assault and battery upon John Doe. Assuming that the latter brings an action to recover damages for this wrong, what must he allege in order to show it? According to Chitty, this: "for that the defendant assaulted and beat the plaintiff";[1] or, as Maxwell puts it: "The plaintiff alleges that on the 4th day of April, 1899, the defendant unlawfully made an assault upon the plaintiff, and him, the said plaintiff, did then and there beat and ill-treat." [2]

2. Take now the second case, wherein John Doe is said to have stolen a watch from David Jones. The latter wishes to recover its value. At

common law, his action should be for trespass *de bonis asportatis,* and the declaration would aver the facts showing the wrong of which he complained, as follows: "That the defendant seized and took the property of the plaintiff; that is to say, one silver watch, of the value of twenty dollars, and carried it away, and injured and disposed of it to his own use." [3]

3. The last of the three illustrative examples was a libel of Moses Dix, by Ichabod Roebuck. According to the English practice at this time, for the purposes of a civil action, the wrong thus done would be shown by alleging that on or about the 3d day of April, 1899, the said Roebuck falsely and maliciously wrote, printed, and published of the said Dix the words following; that is to say: 'He is the man who broke into my barn and stole my cow'; the said Roebuck meaning thereby that the said Dix broke into his barn and stole his cow." [4]

[1] 2 Chitty's Pl., 612.
[2] Code Pl., 601.
[3] 2 Chitty's Pl., 615.
[4] 1 Bullen & Leake's Precedents, 390.

§ 59. Case for breach of contract to sell lands. First, by action at law for damages. Second, suit in equity for specific performance. Here, breach of agreement seen to be wrong, and cause for action. Right under contract condition to commission of *delict,* but no part of "cause."

The cases presented above were crimes or technical torts. Others now will be given aris-

ing out of contracts, or from breach of legal duty that falls within still another class of legal wrongs.

Suppose that May 5, 1890, A, in writing signed by him, sells, and upon the payment by B of $100 in hand, and $900 in one year, agrees to convey to him lot 50, which A then owns in fee, in square 10, in the City of M.; that B pays the $100, and agrees also to take the premises and pay the $900, at the date specified; that on the day named, he duly tenders the $900 to A and demands a conveyance of the lot, and the latter refuses to accept the purchase money or to convey the premises to B, though still seized of them. Let it also be supposed that during the year this lot has increased in value until it is worth, at the time A. was entitled to a conveyance of it, $1,500. Now, in such case he may sue at law to recover damages—the difference between the purchase price and value of the lot when it should have been conveyed to him, with the $100 paid—as his redress for the wrong done by the breach of this contract; or, by a suit in equity, he may obtain relief in a decree for specific performance, which will give him the title to the lot.

1. If the action were for damages, his declaration or petition might in its body be as follows:

By an agreement bearing date the 5th day of May, 1890, it was agreed by and between the plaintiff and the defendant that the defendant should sell to the plaintiff, and the plaintiff should

purchase from the defendant, for an estate in fee simple, land situate in the city of Marietta, County of Washington, and State of Ohio, and known and described as lot 50 in square 10 of said city, upon the terms and conditions following, viz.: That the plaintiff should pay the defendant $100, part of said purchase money on the signing of said agreement, and the remainder in one year thereafter, on which day the said purchase should be completed, and the defendant should execute to the plaintiff a proper conveyance of said premises. The plaintiff paid said sum of $100 on the signing of said agreement, and in one year from the date thereof, duly tendered to the defendant $900, the remainder of said purchase money, and requested him to convey said premises to plaintiff, according to the terms of said agreement, *but the defendant refused and still refuses to execute and deliver such conveyance.* The plaintiff says that at the date when he should have had a conveyance of said lot as aforesaid, its fair market value was $1,500, and that it still is worth that sum or more. Wherefore, the plaintiff says that he has sustained damages in the sum of $600, for which he demands judgment, with interest on $100 from May 5, 1901.[1]

2. But if instead of an action at law for damages, the purchaser desired a specific performance of the agreement to convey, his bill or petition could be in this form:

The plaintiff alleges that on the 5th day of May, 1890, the defendant, being the owner in fee of the following described premises, viz.: Lot 50,

in the City of Marietta, County of Washington, State of Ohio, on said day sold the same to the plaintiff, and entered into an agreement in writing, duly signed, in relation thereto with the defendant, of which the following is a copy: [Here, of course, it would be copied. Assuming its tenor and effect to be what was stated above, the pleading should then proceed.] On the day when said sum of $900, the remainder of said purchase money, was to be paid, to wit, May 5, 1891, the plaintiff duly tendered that sum to the defendant, and requested him to convey said premises to the plaintiff, according to the terms of said agreement, *but he refused and still refuses to execute and deliver such conveyance.* The plaintiff now brings said sum of $900 into court and offers the same to said defendant, upon his executing and delivering to plaintiff a sufficient conveyance of said premises, according to said agreement. Plaintiff, therefore, prays that said defendant be required to receive said sum of $900 and to execute and deliver to plaintiff a deed of conveyance of said premises, and for such other relief as justice may require.[2]

Now, it is obvious that in either suit on this contract, the facts which show a *cause* for action are those which state the *breach* of the agreement, that evince, in other words, the existence of a legal *wrong,* committed by the defendant against the plaintiff, in violating the legal *right* of the latter to have his contract fully performed. Here, as in the cases of crime and tort, the *act* which constitutes the *wrong* becomes and is the gravamen of the action. Facts stated aside from that are mere-

ly to show that such a right—which a court can not judicially take notice of—has, as between the parties, been created. But its existence is plainly and simply a *condition* to the commission of the particular wrong done by its *violation,* in refusing to perform the contract, and not a part of the *delict* itself. That is, if there had been no such right, it could not be infringed, and the *right* can not be made part of the wrongful *act* which violates it by any true analysis of the matter.

[1] 1 Bullen & L.'s Prec's, 319.
[2] Lube's Eq. Pl., 355; 3 Daniell's Ch. Pr., 1890; Maxwell's Code Pl., 310.

§ 60. An instance of action for breach of legal duty, not *ex contractu* or *ex delicto.* Legal wrong sole cause for action.

Take a case now, which is in fact neither *ex delicto* nor *ex contractu,* but one involving a breach of legal duty, pure and simple. This will appear in the form of setting it out—constructed upon the basis of other approved precedents, which is as follows:

The plaintiff says that he is a relative of one S. J., late the lawful wife of the defendant; that for some time before, and up to her death, the said S. J. lived in the home of the plaintiff; that at the time when the said S. J. died, which the plaintiff avers was on the 4th day of June, 1895, the defendant was absent from her, and did not return until after it became necessary to bury the remains of his said wife. Plaintiff says that in

order to their decent and proper interment it became and was necessary that he should incur the expense thereof, which he did by securing the services of one A. B., an undertaker, who at plaintiff's request provided a casket, hearse and other necessary things for the funeral of the said S. J., and managed the same. Plaintiff says that the said A. B. delivered to him an account for his said goods and services, rendered in and for said funeral and burial, which amounts to the sum of $100; that the said charges were fair and reasonable, and were paid by the plaintiff. That afterward, to wit, on the 10th day of July, 1895, plaintiff delivered said account to the defendant and requested him to pay the amount thereof to the plaintiff, *but he then refused and still refuses to pay the same, or any part thereof.*[1]

Evidently, the legal right here was to be reimbursed by the husband for expenses incurred in the discharge of a duty which the law primarily imposed upon him. Consequently, the *wrong* to the plaintiff consists alone in the *violation* of that right by *refusing* to pay him the sum so expended; that *delict* was his cause for action. As in all suits for breaches of contracts, what preceded the refusal, upon demand, to reimburse the plaintiff, was merely to show the existence of a legal right which the court could not judicially notice, and in the absence of which the refusal to pay would not be a legal wrong. But in this, manifestly, as in those cases, the right is related to the

wrong only as a condition to the existence of the latter, and not as any part of the *delict* itself.

[1] 1 Bullen & L.'s Prec's, 189; Ambrose v. Kerrison, 10 C. B., 776; Patterson v. Patterson, 54 N. Y. 574-583.

§ 61. Equitable suit to enjoin private nuisance, shows that the wrong is the cause.

The general principle further may be illustrated, and its application shown by an equitable suit to enjoin a private nuisance. In Maxwell is the form which, filled out, gives a case thus:

The plaintiff alleges that for ten years past he has been the owner of a farm in the township of Lodi, through which has ever flowed and now flows a stream known as Blue Creek. On or about the 6th day of April, 1892, said defendant erected a paper mill on said stream about two miles above said plaintiff's farm, and has been manufacturing paper at said mill from thence until the present time. In the use of said mill said defendant has employed, for cleaning rags, various noxious chemical preparations, and *has permitted the same, after being so used for such purpose, to flow into said creek, thereby rendering the water therein unwholesome and unfit for use or for stock to drink.* Before the erection of said mill the plaintiff, by the use of pipes, had carried the water of said stream to his house, and was using it for domestic purposes, and also for watering his stock at said stream; but that since the manufacture of paper at said mill was begun, the water of said stream, where it enters the plaintiff's said farm, and along its entire course through the same, is so foul from

permitting said chemicals to flow into and mingle with it as to be unfit to use, either for domestic purposes or for stock to drink, and because thereof is not used by the plaintiff. On the 5th day of June, 1892, the plaintiff notified said defendant of the injury to the water in said stream and the cause thereof, and then requested him to desist from any further pollution of the same by said chemicals; but notwithstanding, *said defendant still continues said injury to the plaintiff.*[1]

This petition or bill states a case of continuing nuisance. The original *act* of polluting the stream was a violation of the plaintiff's rights and therefore a legal *wrong,* for which he could maintain an action at law for damages. But the persistence in the injurious conduct, after notice, with the inadequacy in such cases of purely legal remedy, entitles to that form of equitable relief which will stop future wrongdoing. Plainly, however, it is the *wrong* done by such violation of the *right* in the waters of the stream, which is the cause for action in giving remedy by means of an injunction.

[1] Maxwell's Code Pl., 725.

§ 62. Relief in equity by correction of a mutual mistake in a deed, rests upon the same ground. Defect in old form of petition or bill pointed out. Demand shown necessary to put an innocent party in fault and make cause for action against him.

The next case taken is one within the equitable jurisdiction to correct a mutual mistake of the parties in a written instrument, executed by them, or by one, to carry into effect an agreement into which they had entered. An old form is used as follows:

Humbly complaining, showeth unto your honors, the plaintiff.

That on the 7th day of July, 1897, the defendant executed and delivered to the plaintiff, under his hand and seal, a deed, of which the following is a copy: Be it known that John Thomas, in consideration of $1,000 to him paid by David Mills doth thereby bargain, sell, and convey to the said Mills, his heirs and assigns forever, all that certain lot in the City of Washington, District of Columbia, beginning at the intersection of A and B streets in said city, thence running easterly along A street 100 feet, thence southwardly along B street 200 feet, thence westerly and parallel to C street 100 feet thence southerly and parallel to D street 200 feet, to the place of beginning; to have and to hold the same unto the said David Mills, his heirs and assigns forever.

That the description therein given of the premises intended to be conveyed was erroneous, and, in fact, does not describe any premises whatever; that the word "southerly," as last used in said description, was inserted by mistake of the parties to said deed, instead of the word "northerly," which should have been used instead thereof; and that in order to make said deed pass any premises whatever to the plaintiff, and to make it conform to the actual intention of the parties, it is necessary that the said description should be rectified and reformed by substituting the word "northerly" for the word "southerly," where the latter is used therein. That the plaintiff has paid to the defendant for the said premises the consideration expressed in said deed.[1] [That on the 9th day of August, 1897, the time when the plaintiff first discovered the error, and became aware of the mistake in said description, he notified the defendant thereof and requested him to correct the same, in said deed or by a new conveyance of said premises, proffering also to pay any expenses which he might thereby incur; *but the defendant then refused and still refuses to make such correction.*]

It will be observed that this precedent presents a case for affirmative relief, by the correction of an alleged *mutual mistake* of the parties. No question of fraud is involved, nor is *fault* shown in the defendant more than the plaintiff, until the former had notice of and neglected or refused to correct the error into which it is averred that both had fallen. The ordinary presump-

tion of common honesty presupposes that if the defendant admitted the mistake, on notice, he would amend the deed; hence, that before he should be mulct in costs, opportunity to do so ought to be given. Certainly no court of equity would award them against a party who came in promptly, and by answer set up that he was unaware of the mistake alleged until the suit was brought; that the intention was to convey what the corrected description covers; and that if the plaintiff had notified him of the error, he would at once have corrected it—as then he is ready to do. It is in this view that the closing paragraph in brackets has been added to the old form. Without it, no *wrong* is shown, and hence no cause for, or right to, *action*. By force of the maxim that the practice of a court is its law, where the old chancery procedure in strictness obtains, this may not be so considered. But upon the very bottom principles of pleading, and especially under the Code system, which calls for *facts* showing a *cause* for action, it is submitted that the addition made, or something like it, is not only proper but necessary. Until the defendant has refused to correct a mistake, if he be *sui juris*, there is no ground upon which to call for a decree of the *court* for that purpose. Indeed, it truly may be said that he has a *right* to amend the error by his own act, and if so, is entitled to notice that it exists, with reasonable opportunity for its correction, before he shall

be subjected to the inconvenience and expense of a suit therefor. Walker says that "every denial to another of that which is his legal right, is as really a wrong as that which results from a direct act." [2] But until the right is *denied,* by the principle thus stated, there can be no *delict,* and consequently no cause for action. Mr. Bliss states the true view in cases like this, by saying that the party "commits a wrong by refusing the remedy without action"; which implies that he had notice and failed to correct the mistake. This seems to me unquestionably sound doctrine.

[1] 3 Daniell's Ch. Pr., 1972; Luke's Eq. Pl., 355; Page v. Higgins, 5 L. R. A., 152 and note; II Pomeroy's Eq., § 859. There it is said that the "evidence of the mistake and of the alleged modification must be most clear and convincing, * * or else the mistake must be admitted by the opposite party." This would seem to imply that the matter had been called to his attention, yet he had neglected to correct the error.

[2] American Law, § 207.

§ 63. **Case of Libel *in rem* in admiralty given. Complicated and lengthy in statement, analysis shows that there as in other suits, the legal wrong is the cause for action. Other facts than those which evince *delict* necessary merely to show a right that is condition to, but not part of it — or, formal averments required by rules of practice, which serve as its setting.**

Finally, in this illustrative showing of how the principle that a cause for action in all suits

is a legal wrong, a case of *Libel in rem* in Admiralty is presented. The precedent is lengthy, but because of the matters additional to the facts which evince the *delict,* becomes all the more instructive to the student. Omitting the caption, and using letters for the names of parties and steamers, and figures for quantities and values, it is as follows:

The libel of A., B., C., and D. against the steamships X. and Y., their engines, etc., and against all persons claiming any interest therein, in a cause of action, civil and maritime, of a nature hereinafter more specifically set forth, alleges as follows:

First. At all the times hereinafter mentioned the libellants were underwriters, members of Lloyds, and lawfully engaged in and transacting the business of marine insurance in London, England.

Second. On or about the 11th day of June, 1880, the firm of R. & Co., merchants of the City of New York, shipped, in good order and condition, on board the steamer X., then lying in the port of New York, and bound to the port of L., to be transported in said steamer to said port of H., 310 tubs of butter, 145 of which were marked "A," 100 of which were marked "B," and 65 of which were marked "C," and which tubs of butter the agents of said steamer X. did agree to transport and deliver at H. by the said steamer X. to the order of the shipper, and at the time aforesaid did issue a bill of lading in accordance with such agreement. Said goods were shipped by

R. & Co for joint account with F. G. & Co., of L., and were owned by the said R. G. & Co., and F. G. & Co. jointly, and after said shipment the bill of lading issued as aforesaid therefor was duly endorsed by said R. & Co., and delivered to said F. G. & Co.

Third. On or about the 11th day of June, 1880, the firm of M. & S., merchants of the City of New York, shipped, in good order and condition, on board said steamer X., to be transported in the said steamer from the port of New York to the port of L., 102 boxes of cheese, 39 of which were marked "F," 26 of which were marked "G," and 37 of which were marked "H," and which boxes of cheese the agents of said steamer did agree to transport and deliver at L. to the order of the shippers, and at the time aforesaid did issue a bill of lading in accordance with said agreement. Said goods were shipped by said M. & S. for account of the firm of F., G. & Co., of L., who were, and continued to be, the owners of the said goods, and after said shipment said bill of lading issued as aforesaid therefor was duly endorsed by said M. S. and delivered to said F., G. & Co.

Fourth. On or about the 12th day of June, 1880, the said steamer X. set sail from the port of New York, bound for the port of L., having on board both the aforesaid lots of merchandise, which had been shipped on board said steamer at said port of New York in good order and condition, and at about half-past one o'clock in the afternoon of June 13, 1880, the said steamer X., when about 310 miles east of Sandy Hook, came into violent collision with said steamer Y., and

by said collision a large hole was made in the starboard side of the steamer X., by reason whereof the compartments in which the above mentioned lots of merchandise were stored were flooded, and the said lots of merchandise were wholly lost to the owners, most of them being lost through the said hole into the sea, and the others being jettisoned.

Fifth. On or about the 29th day of December, 1879, the libellants, in the regular course of their business as marine insurers, issued to D. & W., for and in consideration of the premiums paid, an open policy of insurance in the sum of $25,000, bearing date on said 29th of December, 1879, and in and by said policy of insurance the libellants argued to insure the said D. & W., as well in their own name as for and in the name and names of every other person or persons to whom the same did, might or should appertain in part or in whole, and did cause them and each of such persons to be insured at and from New York to London, or port or ports, place or places, on the west coast of Great Britain, upon any kind of goods and merchandise against loss or damage arising from adventures and perils of the sea, and all other perils, loss and misfortunes that might come to the hurt, detriment or damage of said goods upon the voyage; that by the terms of said policy of insurance the libellants, A. and B., each became the insurer in the sum of $5,000 of said $25,000, which was the total sum covered by said policy, and the other libellants each became insurer to the extent of $5,000, and the libellants agreed to become insurers in such propor-

tions upon any shipment declared under the said policy of insurance; that thereafter and in the month of June, 1880, D. & W. declared insurance upon said lot of 310 tubs of butter to the amount of $2,800, for the benefit of the owners of said tubs of butter, and they further declared insurance upon said lot of 102 boxes of cheese in the sum of $750, for the benefit of the owners of said boxes of cheese, and the said insurance was accepted and endorsed by and for the libellants upon said policy, said sums being only equal to or less than the true value of said goods.

Sixth. The aforesaid collision occurred as follows: The X., up to a very short time before the collision, was proceeding on an easterly course at the rate of about 14 miles an hour, which speed she maintained until the collision, and the said steamer Y., up to within a very short time before the collision, was proceeding on a west by north course, bound from Liverpool to New York, at a high rate of speed; the sea was smooth, and there was little wind, but there was a dense fog, in which the said steamers had been running for a long time before the collision; neither vessel had sufficient lookouts; both vessels at intervals were giving signals with their steam whistles. While so proceeding, the officers of the steamer Y. heard the fog signal of the steamer X over the port bow of their vessel, and gave orders to the man at the wheel to port, which order was executed; and the officers of the X. heard the fog signal of the steamer Y. over the starboard bow of their vessel, and gave orders to the man at the wheel to starboard, which order was executed. A few min-

utes later, each steamer became visible to those on board of the other steamer, close at hand; whereupon, those in charge of the steamer Y. ordered her engines to be stopped and reversed, but before any perceptible influence was exerted on the speed of the steamer the two vessels came into collision.

Seventh. The collision was due to the *fault and negligence of those in charge of the steamers X. and Y., respectively, in that they were proceeding at too high a rate of speed, in that they had no good and sufficient lookouts, in that they did not give the proper signals by which to indicate each to the other their respective courses and movements, in that they did not heed and note the signals given by the approaching vessel, and in that they did not stop and reverse their engines before the collision and at such time as to overcome their headway, and to the fault of those in charge of the navigation of the steamer Y. in that they ported their helm and did not hold their course, and to the fault of those in charge of the navigation of said steamer X. in that they starboarded their helm instead of porting;* and the said collision was not in any respect due to the fault of the libellants.

Eighth. By reason of the premises and the collision aforesaid, and the resultant loss and destruction of said lots of merchandise, the libellants as insurers as aforesaid became liable to pay, and have paid, on or about the 15th day of August, 1880, to the said F., G. & Co., for the loss as aforesaid for said 310 tubs of butter, the sum of $2,800, and for the loss and destruction of said 102 boxes of cheese as aforesaid, the further sum

of $750, and have become subrogated to all the rights of the owners of said merchandise, and that they have received the sum of $350, being allowance in general average for goods jettisoned.

Ninth. By reason of the premises and the payment aforesaid, the libellants have sustained damages in the sum of $3,200, with interest thereon from the 15th day of August, 1880, *no part of which has been paid, although payment thereof has been duly demanded by the libellants.*

Tenth. Said steamers X. and Y. are now within this district, and within the jurisdiction of this court.

Eleventh. All and singular the premises are true and within the admiralty jurisdiction of this honorable court.

Wherefore the libellants pray that process * * may issue against the said steamships X. and Y., their engines, etc., * * that all persons claiming any interest therein may be cited to appear and answer the matters aforesaid, and that said steamships and their engines, etc. may be condemned and sold to satisfy the claim of the libellants aforesaid, with interest thereon from the 15th day of August, 1880, and costs. Then follows the name of the attorney, and a verification of the libel, as in case of a petition in Code pleading.[1]

With respect to this pleading, it is to be recalled that each vessel being shown to have been in fault, both became liable to the parties thus injured.[2] On the facts stated, those primarily entitled to redress for the alleged wrong, were the

owners of the butter and cheese. Had the libel been filed by them, however, all that is set out as to the insurance and its payment must have been omitted. Only the allegations which show the ownership and contract for shipment of the goods, their delivery upon the steamer for transportation in accordance therewith, the loss by negligence—their cause for action—with the amount of damage thereby, and the formal averments as to the *locus* of the vessels and the jurisdiction of the court, would, in that case, have been necessary. Moreover, if the steamers had paid the claim thus arising, it is manifest that the libellants could have suffered no injury—the loss covered by the insurance would have been satisfied by those whose wrong had caused it. Consequently, when they sue, it is upon the right accruing to the assured, and which the libellants assert upon the ground of having paid a claim really due from the steamers. But in order to show that the right to action is in themselves, rather than the owners of the goods, at least to the extent of the insurance, all the facts relating thereto, with that of payment, were necessary; for upon them is based the subrogation or equitable assignment of the claim here asserted against the two vessels. Still, the right to suit was not complete until one further step had been taken. The contract relations growing out of the entire transaction created no privity between the libellants and the steamers—this came through the

subrogation, by operation of law. Until notice, therefore, of their claim, with demand for payment and a refusal of this, as between the libellants and the vessels, no breach of duty had occurred, and so no wrong to them could be said to have been committed. Thus at last it is seen that the legal *right* upon which a recovery in this case is predicated, was *to repayment, when this had been demanded, of the sum paid as insurance for the lost goods.* Hence, the violation of that right —the *delict* which was the cause for action—is the *failure to pay after demand,* averred in the ninth paragraph. All that precedes this is merely to show the existence of that right, which, as in respect to rights arising from contracts, the court could not judicially notice. When this is perceived, and the doctrine in admiralty, by which vessels are held to be guilty of and liable for wrongs of the character here in question, growing out of the fault of those managing them, as a corporation would be for analogous misconduct of its agents, is taken into view, the case evidently becomes one that falls into line with the others which have been presented, illustrating the proposition that in all suits the legal wrong—that is, the act or forbearance which violates some legal right—evinced by the facts set out, is the true cause for action. The framework of allegation or averment in pleadings, apart from what shows the *delict* complained of, constitute a predicate for

this, by evincing a right which was a condition, simply, to its commission; or, they become a setting for it, which varies according to the nature of the case, and the formal requirements of practice in different courts and jurisdictions. As an example of the latter, in Ohio the Code of Civil Procedure provides that "the first pleading on the part of the plaintiff shall be the petition, which must contain the name of the court and the county in which the action is brought, and the names of the parties, followed by the word 'Petition.'" Now, while these requirements are peremptory, and a suit against objection can not proceed, when in any particular they have not been complied with, yet these things, one or all, are no part of the cause for action. This is made evident by further expressly providing that in addition to them, the petition shall contain "a statement of the facts constituting [showing] a cause of action." But the subject need not be pursued. Enough has been said to make the doctrine maintained quite clear, on principle; to give it objective and practical illustration, in cases; and to furnish a key, thereby, for the analysis of all pleadings by which suits are begun, with a view to discovering the legal ground of, or cause for, complaint.

[1] 2 Foster's Fed. Pr., 1188.
[2] 2 Foster's Fed. Pr., § 396.

PART THIRD.

CHAPTER I.

LOCUS OF THE CAUSE FOR ACTION.

§ 64. This important in criminal actions, statutes limitations, performance contracts, jurisdiction of courts.

This question may arise and become of importance, not only in regard to the place for criminal prosecutions, but also in respect to statutes of limitations, the performance of contracts, and the jurisdiction of courts. As to the latter, this already has been made apparent. The doctrine which always finds the cause for action in a legal wrong, however, will greatly simplify the problem of its *locus* in many cases. For example, take the common provision that if, by the laws of the state or country where the cause of action arose, the suit is barred, it shall be barred in the state where it is instituted; or the one by which certain actions "must be brought in the county where the cause, or some part thereof, arose." On the principle that the "cause" is to be found in a legal

wrong, whatever the nature of this may be, the place where the breach of duty occurred, out of which it arises, at once settles the question; and makes the dichotomous splitting of a cause for action between the *delict* and primary *right,* which some courts have assumed to be necessary in order to support their jurisdiction, wholly superfluous.[1]

[1] Jackson v. Spittall, L. R.; 5 C. P., 542, for example.

§ 65. Generally, locus of cause that of wrongdoer. Exceptions.

Speaking generally, the *locus* of the cause for action will be that in which the wrong was done; and this is also the place of the wrongdoer,[1] except in cases where he has obligated himself to the performance of a legal duty elsewhere, or, acting by the innocent agency of a third party, is guilty of violating the law of another state than the one in which he resided when the offense was committed.

[1] "Originally all actions were tried in the proper counties in which they arose, pursuant to the maxim *vicini Vicinorum presumuntur scire;* this created no inconveniency, for all men being anciently *in decenna* they were easily come at; but when the custom of *decennary* began to wear off, men used to fly from their creditors, and this begot the distinction between local and transitory actions." (Bacon's Ab., Actions, Loc. & Trans.; Livingston v. Jefferson, 1 Brock., 203.) Apart from statutory regulation, however, the doctrine now prevailing is that "where a cause of action may arise

anywhere, an action thereon is transitory, and when it could have arisen in one place only, the action is local." Morrris v. Misso. P. R. Co., 78 Tex., 17; 22 Am. St., 17, 22.

§ 66. Contracts. Place of breach, that of wrong. So, in all cases of non-feasance.

As respects their nature, validity and interpretation, contracts are governed by the law of the place where they were made, unless the contracting parties appear to have had some other place in view. However, if an agreement is entered into, in one place, but is to be performed in another, upon a failure to comply with its requirements, the breach, hence the wrong it creates, in legal view occur in the latter place, regardless of where the party in fault at the time may have been.[1] The same principle, evidently, will apply and determine the *locus* of the *delict*, consequently of the cause for action, in any other case of mere non-feasance.

[1] U. S. v. N. C., 136 U. S., 222; Prichard v. Norton, 106 U. S., 124; Andrews v. Pond, 13 Pet., 77; Liverpool S. Co. v. Phenix Ins. Co., 129 U. S., 397; Scudder v. U. N. B., 91 U. S., 406; Veeder v. Baker, 83 N. Y., 156; Hibernia N. B. v. Lacombe, 84 N. Y., 368.

§ 67. Positive personal acts which are wrongs, generally locus of cause. Exception, if one acts by innocent agent in another jurisdiction.

On the other hand, with regard to positive, personal acts, which constitute wrongs technically

classed as torts or crimes, excepting the instances where the wrongdoer acts through an innocent agent in another place, the case is different; and the *locus* of the cause for action is generally that of the offender. But, as already implied, the maxim *qui facit per alium, facit per se,* applies to criminal misconduct, with the result that one may be held guilty of an offense committed by his procurement in a jurisdiction where, in fact, he never in person has been, as resident or otherwise.[1] It hardly need be said that in such a case, the *locus* of the cause for action is the place where the wrongful act was done. And these cases harmonize entirely with the principle in the law of homicide, "that the infliction of the mortal blow constitutes the crime," the consequence of which is that its *locus* is that of the act which constitutes the offense.

[1] People v. Adams, 1 N. Y., 173; Barkhamsted v. Parsons, 3 Conn., 8; Lindsey v. State, 38 O. St., 512; People v. Adams, 3 Denio, 190; 45 Am. Dec., 468.

CHAPTER II.

THE CAUSE FOR ACTION, AND PARTIES.

§ 68. Relation of cause to law of parties worthy of notice. Not before pointed out. Natural ground for evolution of principles pertaining to.

The cause for action having been identified in all cases, civil or criminal, with a legal wrong—and the principles upon which its *locus* depends, briefly stated—the relation of the cause, thus conceived, to the law of parties, seems to be worthy of notice. I am not aware that this heretofore has been pointed out. Yet when the cause for action clearly and distinctly is seen, it becomes the natural ground for the evolution and unfolding of the principles which underlie the law respecting parties to actions; at least so far as a person may be directly related to the wrongful act upon which a suit is predicated. A definite conception of the cause in the view herein set forth, makes luminous the inquiry as to who, in a given case, may sue and against whom the action will lie.

§ 69. Cause in criminal cases points out parties — those doing wrongful act — unless as to accessories.

Concerning criminal actions, or prosecutions, as they more commonly are termed, when the causes for them are discerned, the parties inculpated at once are pointed out. Indeed, the first inquiry in such cases is, Who committed the act which is the ground of complaint? That becomes the starting point to be extended by ascertaining whether any but those directly implicated may have been accessory to the offense, before or after the fact. Hence, in this class of actions, the law as to the parties plainly springs out of the cause for action —is largely, if not wholly, determined by it. This is so evident when stated, as to be elementary, yet it has not hitherto been formulated. Arising, as it does, from a principle of wide application in the field of legal procedure to all cases, in fact, where the redress of injuries is sought in courts of justice, it has been deemed of sufficient importance to merit a statement.

§ 70. Same principle applies to actions at law. Rule by Chitty. Cause for action, index to parties.

What has been said in regard to criminal proceedings applies with almost equal force to civil suits of the class distinctively known as actions at law. The classic statement of the general

rule here, by Chitty, is, "that the action should be brought in the name of the party whose legal right has been affected, against the party who committed or caused the injury, or by or against his personal representative."[1] This obviously rests upon the principle that the relation of persons to the cause for action determines whether or not they are proper parties to a suit upon it. Consequently, when the cause is perceived, it becomes the primary and chief guide on this question—settles it, save when controlled by special rules of practice, which as a matter of policy or convenience, may be established.

[1] 1 Chitty's Pl., 1.

§ 71. Suits in equity stand on same ground. Supplemented by rule as to parties necessary to complete relief, etc. Illustration.

Suits in equity stand upon the same ground as actions at law, supplemented by rules in regard to parties growing out of what is requisite to the giving of complete relief in certain cases, and the policy prevailing in chancery, which permits the settling in one action of disputes other than a complainant's, as to its subject matter. Take first a simple foreclosure, by A against B, of a mortgage on otherwise unincumbered lands. The wrong, evidently, is the failure of the debtor to pay the secured liability. No one else is related to

this, nor to the property pledged for its payment; consequently, they are the only proper parties to the suit. Suppose, however, that A sold and conveyed the lands to B, but had a vendor's lien thereon for unpaid purchase money; that afterwards B mortgaged them to C to secure a debt, and later sold his equity of redemption to D, who knew of B's lien, making a deed of the premises to D. In this situation of the property, B having defaulted in payment, both of the balance of purchase money and mortgage, C proceeds to foreclose, in a jurisdiction where, as in Ohio, a sale of mortgaged premises in all cases must be ordered, if the amount found due is not paid within a period fixed. Clearly, B has no cause for action against anyone but C. Nevertheless, since he seeks a sale of B's interest in the lands as it stood when the mortgage was given, and this was subject to the vendor's lien held by A—the legal title also being in D—all become necessary parties, in order that C may obtain adequate remedy. The cause for action in behalf of C indicates who are the proper parties to the suit, so far as relates to the one in default and his right to action, consequent thereon; and the *status* of the mortgaged property, as to the other claims upon, or rights in it, with what in that case becomes essential to the final relief sought, determines the additional parties who should be brought in. This sufficiently illustrates two classes of cases in equity, and the

reason in one for the presence of parties other than those related to the cause for action. These really are called in by the operation of principles established regarding what is necessary to complete relief in such or similar cases.[1]

[1] "It is the constant aim of a Court of Equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, so as to make the performance of the order of the Court perfectly safe to those who are compelled to obey it, and to prevent further litigation. For this purpose, all persons materially interested in the subject ought generally, either as plaintiffs or defendants, to be made parties to the suit." 1 Daniell's Ch. Pr., 190, 246; McArthur v. Scott, 113 U. S., 341. This general rule is stated by Bradley, J., with these qualifications," viz.: "where a person will be directly affected by a decree, he is an indispensable party, unless the parties are too numerous to be brought before the Court, when the case is subject to a special rule. Where a person is interested in the controversy, but will not be directly affected by a decree in his absence, he is not an indispensable party, but he should be made a party if possible, and the court will not proceed to a decree without him if he can be reached. Where he is not interested in the controversy between the immediate litigants, but has an interest in the subject matter which may be conveniently settled in the suit, and thereby prevent further litigation, he may be a party or not, at the option of the complainant." Williams v. Bankhead, 19 Wall., 571; Fellows v. Fellows, 4 Cow., 682; 15 Am. D., 412; Story's Eq. Pl., § 72; Louisville Ry. Co. v. Mississippi, 133 U. S., 586. The Ohio Civil Code in effect codifies these doctrines. Bates' R. S., §§ 5005, 5006, 5008, 5013. There it is held also that the rule in cases where the parties are too numerous to be brought before the court, "applies to actions of a legal, as well as to those of an equitable nature." Platt v. Colvin, 50 O. St., 703.

§72. Actions *in rem* no exception to principle. The thing there treated as offender. Hence is guilty of wrong.

Admiralty proceedings *in rem*, when properly understood, are no exception to the principles stated. The action there is against a thing rather than a person. First, it actually must be seized, in order that jurisdiction shall attach.[1] But once in the custody of the law—a boat, for instance—the "proceeding is not against the owner, but against the vessel, for the offense committed by the vessel." In a court of admiralty "the thing is primarily considered as the offender, or rather, the offense is primarily attached to the thing."[2] By "personifying language"[3] it is treated as an actor, and so regarded as responsible for certain acts of those controlling its movements—guilty of legal wrongs; consequently, in law as responsible therefor, like corporations or natural persons.

[1] Cooper v. Reynolds, 10 Wall., 317; The Rio Grande, 23 Wall., 458.

[2] U. S. v. Brig., M. A., 2 How. (U. S.), 210, 224; Keating v. Spink, 3 O. St., 114.

[3] Holmes Com. Law., 30.

§73. Cause for action ground for seeing who parties to suits. Illumines special rules on subject.

Manifestly, then, the cause for action as the ground upon which one must stand, in order to

discern the proper parties to a suit, underlies all judicial proceedings—illuminating even the special rules upon that subject, by making their reasons more readily apparent. Hence, supplemented in equity by what is required for adequate or complete remedy, or the policy of chancery courts, the clearly perceived "cause" becomes an index to them, in all cases where the original parties are *sui juris,* and in life.

CHAPTER III.

THE CAUSE FOR ACTION, AND PLEADING.

§ 74. Their relation not been marked out. Suggestion of by Bliss. Phillips gets close to it. Wrong as cause, determines facts necessary to get remedy. Exceptions in equity, on special ground.

As it appears to me, the relation of the cause for action clearly defined, to the law of pleading, never has been adequately marked out. There is a suggestion of it, perhaps, by Mr. Bliss. On his view of what constitutes the cause for action, Judge Phillips gets close to the heart of the matter. But the principle is, as I apprehend, that when the legal wrong is taken as the cause, *it at once determines the facts to be stated in order to show a title to remedy, in all suits, civil or criminal.* The class of cases in equity where for purposes of complete relief, and otherwise, parties not related to it are brought in, are exceptions, growing out of their connection with the subject of the action.[1]

[1] The fact that in some cases where justice palpably demanded the redress of acts done or refused by one,

to the substantial injury of another, courts of law were unable to give it, was the historical reason for, and origin of, equitable relief. At first, this form of remedy was granted by the King in person, or by his Chancellor. The office of the latter, however, finally developed into a court of Chancery; and in time the "doctrine of the authoritative force of judicial precedent," which, as it appears in the common law, "stands alone in the history of the world," spread its steadying influence over that tribunal. In this way, and by these means, a stable system of equity law was built up in England, which also extended to, and almost from the beginning of our legal history has been, as it continues to be, a salient feature of remedial law in this country. Moreover, it is settled that the civil codes which abolish the old forms of pleading, and make an action at law and suit in equity a "civil action" simply have in no wise affected the distinctive jurisdictions of law and equity courts, or the two classes of rights known as legal and equitable. The result is, as declared by the Supreme Court of the United States, that "the relief which the law affords must still be administered through the intervention of a jury, unless a jury be waived"; and "the relief which equity affords must still be applied by the court itself." (Basey v. Gallaher, 20 Wall., 680.) What thus is stated clearly marks one of the chief distinctions between these different jurisdictions—the mode in which redress is obtained. And that remains although legal and equitable relief may be had in the same court. This is all quite plain upon the mere statement, yet it opens the way to a few remarks in regard to equitable *remedy,* as affecting the question of *parties,* and the *facts* to be stated, in a class of cases in equity. An illustration on this point already has been given (*supra,* §71). But what I wish to emphasize is that when a cause for action in chancery is shown, *the great attribute of that court appears in the plastic power it possesses to extend and mould its redress so as to cover and meet all aspects of a case; and to this end to require every party necessary thereto to*

be brought before it. For thus it is made evident that the nature and measure of the relief sought, with what becomes essential to that may determine who *must* be made parties. So far as relates to those in whose favor a right to action exists, considered with sole reference to the *wrong* for which redress is prayed, suits at law and in equity stand upon precisely the same footing; as in that view, while the character of the relief obtainable differs, none but the wrongdoer and the person injured are concerned. For instance, take the case of a promissory note from A to B, for $500, secured by B's mortgage of his unincumbered lands. If A sues on the note at law, B alone is defendant, and the same would be true were he to proceed in equity for the foreclosure of the mortgage. The difference between the two cases lies wholly in the form of redress and the mode of getting it. From this it becomes manifest that when, in equity, persons other than those connected with the *delict* which always must be shown to entitle one to any relief, are brought in, primarily it is in order that adequate or complete remedy may be given, and such are *necessary* parties. Beyond them, however, with a view to settling all disputes relating to the subject of action—though this be not indispensable to the redress a plaintiff seeks—and so of preventing the multiplication of suits, still others may be called in, and they, of course, are *proper* parties. Thus it appears that the legal rule is supplemented in equity (1) by what is essential to the nature and extent of the relief demanded, and (2) by the requirements of a policy which permits controversies touching the subject of suit, other than those made by the complainant, to be determined therein. (Story's Eq. Pl., § 72. Consequently, as stated by Lube, parties "may be divided into principal and collateral. And this," he adds, "is a distinction useful to be kept in view, for the clear perception of the scope of the bill and for determining who are the necessary parties to the suit." (Equity Pl., 36.) But what has been shown becomes relevant also to the facts which, in the class of cases under consideration, should

be alleged, in addition to those evincing the wrong that is the cause for action. Here the extent of relief cuts a large figure. Accordingly, under the old chancery practice a complainant might "state any matter of evidence in the bill or any collateral fact, the admission of which, by the defendant, may be material in establishing the general allegations of the bill as a pleading, or in *ascertaining or determining the nature and extent, or the kind, of relief to which the complainant may be entitled consistently with the case made by the bill, or which may legally influence the court in determining the question of costs.*" (Hawley v. Wolverton, 5 Paige, 523.) Taken *mutatis mutandis,* this applies to petitions under the Code procedure also. And by parity of reasoning, evidently, when others than the wrongdoer are made parties, facts which show the propriety or necessity of their presence should be alleged. (Weinmiller v. Laughlin, 51 O. St., 422.) These, of course, will vary with the character of the suit, and the nature and measure of relief demanded. Enough has been said, however, to bring before the mind of a pleader, and presumably make clear the principles by which to determine (1) the parties to a suit in equity, beyond those related to the *delict* complained of; and (2) the facts to be averred, in addition to such as show the *wrong.* Hence, under their guidance, in a study and analysis of cases which arise naturally and logically the inquiry first will be, What is the *delict* and what the *relief* predicated thereon? The wrong is the gravamen of action, but the nature and extent of the redress to which it entitles the complainant, also may be vital. Next, therefore, comes the question as to who are so related to the alleged *delict,* the *relief* sought, or what may be the *subject* of the suit, as to be necessary or proper parties thereto? Finally, if others than the wrongdoer must be brought in, what facts should be stated in order to justify their presence as parties? Briefly, in recapitulation, then, it seems apparent that when the legal *wrong* is taken as the sole *cause* for action, much aid is given in deciding the question,

often difficult, respecting parties to suits in equity. Considered in connection with the relation that the *relief* sought—which brings to view the subject of an action—bears to that problem, the basis for its solution on principle, is found; and the facts, also, to be alleged with reference to this aspect of a case, are made clear.

§ 75. Extracts from legal classic: principles of pleading in nut shell. Wrong as cause, requires statement of facts which show it. This goes to root of matter.

Some passages from an American legal classic are very strikingly pertinent at this point. After quoting Lord Mansfield, who declared that the "substantial rules of pleading are founded in strong sense and the closest logic," the author says: "We may observe that all pleading is essentially a logical process. By analyzing a good declaration, or any good special pleading, if we take into view, with what is expressed, what is necessarily supposed or implied, we shall find in it the elements of a good syllogism. * * Thus, in an action brought for a trespass committed upon land, the declaration may be presented in the following form: 'Against him who has forcibly entered upon my land, I have a right by law to recover damages; the defendant has forcibly entered upon my land; therefore against him I have a right, by law, to recover damages.' In the example here given, the first or major proposition asserts the *legal* principle on which

the plaintiff founds his claim; the second, or minor, alleges the matter of fact to which that principle is applied in the particular case; the conclusion is the legal inference, resulting from the law and fact together, as they appear in the premises. And the judgment of the court, if for the plaintiff, is a reaffirmance of this conclusion, together with an award or sentence of recovery in pursuance of it. In the case stated the plaintiff's alleged right of recovery may be contested by a denial of either of the three propositions which constitute his declaration. * * If, then, the defendant would deny the major or first proposition above stated, which consists of matter of law, he must do it by tendering what is called an issue of law." This is done by a general demurrer. As the "minor or second proposition in the declaration consists only of matter of fact, it must be denied, if at all, by an issue of fact. * * But assuming the major to be correct in principle, and the minor true in point of fact, the conclusion must inevitably follow, unless the defendant can repel it, by alleging some new matter which is inconsistent with it, and which therefore by consequence implies a denial of it." [1] Special requirements aside, here are the principles of pleading in a nut shell. In their light, however, it is clear that the first and fundamental thing is to set out or state the facts which, in legal view, show a cause for action; that is, such as will make apparent to

the court—which always judicially knows the law or major premise—that one invoking the exercise of its remedial powers is entitled to this. Clearly, then, if in all cases some legal wrong is to be considered a cause for such intervention, facts evincing the *delict* are the ones to allege. That goes directly to the root of the matter, both on the question whether a cause for action exists, and in case it does, in simplifying the problem of the pleader in the selection and consequently the averment of such facts as show it.

[1] Gould's Pl., Ch. 1, §§ 7—10.

§ 76. Principle in defenses, illustrated.

The same views apply in pleading defensively. A denial, for example, if that be relied upon, must be of a fact indispensable to the existence of the legal wrong alleged as a cause for action. Or, when defenses, such as payments, release of claim, and the like, are to be interposed, facts showing these should be averred. This is so elementary and familiar, however, that the matter need not further be pursued.

§ 77. Rule by Chitty. Applies to Code systems. Less definite than arises from wrong as cause for action.

The old rule stated by Chitty is that a declaration, and so it may be remarked in passing, petitions under codes of civil procedure, should "con-

tain a statement of all the facts necessary in point of law to sustain the action, and no more." [1] While this is perfectly correct, under both systems of pleading, yet it seems vague in comparison with the principle arising from a true conception of the cause for action. This seen as residing in a legal wrong, for which redress is to be sought, appears much more clearly and definitely to point out the facts requisite to that end.

[1] 1 Chitty's Pl., 264.

§ 78. Cause for action touches law of pleading at another point. Important in regard to joinder of causes. Rule as to, at common law.

There is one other feature in the law of pleading respecting which a true conception of the cause for action is important—wherein difficulties which sometimes arise will more easily be settled by the principle that finds the cause in a legal wrong. The allusion here is to the joinder of causes for action. At common law, "the general principle, as laid down in later times, was that all causes of action between the plaintiff and defendant might and should be joined, provided they were of the same nature, and the same judgment could be given in each." [1] The apparent liberality of this rule was seriously restricted in practice, however, by what related to the forms of actions, to whose rigor it must yield. Besides, any join-

der of legal with equitable causes never was permitted—from the very nature of the procedure in actions at law, could not be.

[1] Hepburn's Devel. of Code Pl., § 51. This is an extraordinarily able and scholarly work, indispensable, in my judgment, to a full understanding of the Reformed Procedure. See also 1 Chitty on Pl., 221.

§ 79. Joinder of causes under Code system. Forms of action abolished, and restrictive effect gone. Legal and equitable causes now may be joined in certain cases.

Under the Code system now so generally adopted in this country, and the British Empire as well, whereby the ancient forms of action have been abolished, not only is the obstruction to a joinder of different causes for action which they in some cases interposed, removed; in a majority of Code jurisdictions all causes, legal and equitable, may be joined in one suit, "provided they affect all the parties, do not require different places of trial, and are all comprised within" certain classes, of which the following, alone material here, is one, viz.: "Causes of action which arise out of the same transaction, or transactions connected with the same subject of action." [1]

[1] Hepburn's Devel. of Code Pl., § 126; Maxwell's Code Pl., 341; Pomeroy's Remedies, §§ 437—505; Bliss on Code Pl., §§ 113—134; Phillips on Code Pl., §§ 195—200.

§ 80. Clause in question broad. Its proper application not always clear. Much discussed by text writers. Cause for action in legal wrong, helpful. An important case given.

The provision as to joinder, above quoted, is, as Judge Phillips says, "broad and comprehensive. The term transaction has no technical meaning, and was probably used in the codes for that reason; the purpose being to avoid a multiplicity of suits between the same parties." The clause in which it occurs has been much considered by text writers, yet many questions necessary to its complete elucidation probably will remain open until settled by authoritative adjudication. A point here, however, is that an accurate conception of the cause for action—one which finds it in a legal wrong alone—will be helpful in construing this new law as to the joinder of causes. Comparison of the discussions upon the subject by Mr. Pomeroy and Mr. Bliss renders this somewhat apparent. A recent case which holds that the *act* which constitutes a legal *wrong,* rather than its effect as an infringement of primary rights, is the cause for action, seems relevant. As stated by the court, the question was, "Where the person himself and his personal property are injured by the same tortious act, does there arise only one cause of action for damages, or is there one separate and independent cause of action for injuries to the per-

son and another for the damages to the property."[1] The latter view evidently would be required by the doctrine contended for by Mr. Pomeroy, and which he applies upon the question of joinder.[2] But the court, following the great weight of authority, decided that the "cause of action" consisted in the "negligent *act* which produced the effect," the obvious consequence of which was to make only one cause in the case, thus cutting out of it the problem of joinder, which if two causes had been found, must have arisen upon its facts.

[1] King v. Chicago, etc., Co., 80 Minn., 83; 81 Am. St., 238; 82 N. W., 1113; Doran v. Cohen, 147 Mass., 342, 606; Bliss v. N. Y. etc., R. R. Co., 160 Mass., 447; 39 Am. St., 504.

[2] Remedies, § 474.

§ 81. Doctrine that cause for action is a legal wrong, clears question of complications. Simplifies problems of joinder. Goes to root of inquiry. Gives a clue to solution of such controversies. Facts to be considered. *Nexus* of cause with transaction or subject of action, natural and logical. When wrong seen to be cause, gives clue to way for solution, in one aspect, of all such inquiries. Subject of action noticed.

On the question of joinder, then, under the provision in discussion, the principle that a legal wrong is the true cause for action, is of importance, if only to clear the subject from needless complications—in showing that it can not arise in

cases of the character given. Beyond this, however, that doctrine will serve to simplify such problems when they do appear. According to one writer, a "danger" here is that of "confounding the reliefs prayed for with the causes of action upon which they are based." [1] But when in every case a cause for action is seen to consist of a legal wrong alone, it easily can be isolated from immaterial facts and circumstances. Moreover, in this view, as the *delict* always must reside in some wrongful *act* or *forbearance,* the relations of the one or the other to the "transaction," which may be under consideration, or to the "subject" of action, are more patent than can be the case when a primary right is complicated with the wrong as a part of the "cause." As it appears to me, indeed, a clue is thus found to the solution of controversies which may arise in regard to the right, and consequent necessity of joinder, under the provision in question. The first inquiry, manifestly, will relate to the causes to be joined. Hence, exactly what they are—the isolation of each—becomes the germinal point. This starts at the root of the matter. The next thing is the relation of the causes to some transaction, as arising out of it, or of transactions connected with the same subject of action. As to one of two or more causes, this, it is presumed, always will be plain. Disputes spring up in respect to the relations of the others. Of course, the facts, with what they legally de-

note, must be kept in mind. Primarily, as I apprehended, the *nexus* of "cause" to "transaction" or "subject," upon which the right and duty of joinder depend, is natural or logical—at least until in particular cases judicial decision stamps it as legal. Now, when one sees the cause for action in a legal wrong, which consists in some *act* or *forbearance* contrary to law, is not the way to a sound conclusion found? In one essential aspect of such inquiries, the relation of the wrongful act or omission which constitutes the *delict,* and so a cause for action, to the particular transaction, or the connection of that with the subject of suit most certainly lies at the bottom; though there still may remain a question regarding the "subject" of action itself, when that becomes material. Upon the latter I do not enter farther than to say that the principle which finds the cause for action in a legal wrong will at least have its suggestive value, and to quote this from Mr. Bliss: "It must be the matter or thing, differing both from the wrong and relief, in regard to which the controversy has arisen, concerning which the wrong has been done; and this, ordinarily, is the property, or the contract and its subject matter, or other thing involved in the dispute." [2]

[1] Phillips on Code Pl., § 196.
[2] Bliss on Code Pl., § 126.

CHAPTER IV.

CONCLUSION.

§ 82. On principle stated, effect of wrong far reaching. Brings remedial law into operation, thus giving right to action — for which it also sufficient cause. This, in *delict* alone, more easily fixes *locus* of. Also, index to parties to suits, and facts which show title to remedy. Exceptions in equity, etc.

On the principles which have been discussed and as it is believed shown to be law, the effect of an act or forbearance which constitutes a legal wrong, is far reaching. Alike in civil and criminal jurisdictions, it brings the law of remedy, which but for wrongful acts ever would remain inactive, into operation. Thus arises the right to action. But from the nature of the case, a wrong, to which remedial law attaches a *right* to suit always becomes a legally sufficient *cause* for it; so that in no possible case can there be a legal wrong without *eo instante* a right to, and cause for, action. Moreover, regarded as in the *delict* alone, the *locus* of the cause is more easily fixed, while parties to suits founded upon it, and the facts

which must be set out in order to show a title to remedy, are clearly indicated. Only in equity, in certain cases, to the end of complete relief, or to avoid other suits, and where because of legal incapacity or the death of parties, one sues or is sued representatively, need the rules thus given be materially enlarged or modified.

§ 83. These views of legal wrong, its sequences and relations not before set out.

These views of a legal wrong, its sequences, and relations to other branches of the law, are not elsewhere set forth and apparently never have been connectedly perceived. That they may be regarded as throwing some light upon the matters which have come under consideration, is my hope, and has been an incentive to this work. And particularly in view of the confusion and error upon that subject in some treatises and cases, have I been interested in trying to show the true doctrine as to what, throughout the whole domain of judicial administration constitutes the cause for action.[1]

[1] Students will profit by keeping in mind the comprehensive scope of remedial law. Procedure falls within its realm. The latter, however, is divided into different fields. This has been an outcome of the evolution by which the law of remedy reached its present state. Still, the various departments into which procedure may be marked off are not entirely foreign to one another. In glancing at these, I first notice that

which takes in the prosecution of alleged criminals, by the state. Then there are the divisions within which are respectively included civil actions at law and suits in equity. Finally, come actions in admiralty. Now, in each of these four fields of procedure there are special rules of practice—as to the ways in which cases shall be brought and tried. Yet, notwithstanding such differences, certain fundamental doctrines are common to all. One of these is that in neither will relief be granted until a *wrong is shown, which calls for redress.* Unless that appears no right to action can be said to exist. The rule also is uniform to the effect that in all indictments, declarations, bills and libels, facts, which on their face evince a *delict,* must be set out, in order to entitle the complaining party to judicial intervention for the purpose of giving any form of relief. Thus these different territories in the domain of adjective law are seen not to be strangers one to the other, nor wholly unrelated. Certain great principles, like well defined and regularly traversed highways, run through and affect them all. That, however, which is the bed rock in the entire system of procedure, in all its divisions, is the *cause for action.* Hence, when it is perceived that this always is found in some *legal wrong,* the way readily opens up and becomes clear for what should follow, in order to obtain redress. The right to action for that purpose then appears, and the essentials of sequent procedure easily are seen.

§ 84 Cause, as general conception for evolution of principles in law of parties and pleading makes book introductory to those subjects. Gives point of view for their scientific development and study.

Finally, in view of what is pointed out regarding the cause as the germinal conception from which there is a natural evolution of some leading

principles in the law of Parties and of Pleading, the book in a measure may serve as an introduction to those subjects. As it seems to me, the cause for action, truly conceived, underlies them, and affords the ground or point of view logically to be taken in their scientific development and study.

For the list of works referred to, the Table of Cases, and the Index, I am indebted to my young friend, Allen Thurman Willlamson, Esq., of the Marietta, O., bar. THE AUTHOR.

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TABLE OF CASES.

C.

D.

E.

F.

G.

H.

J.

K.

L.

M.

N.

O.

P.

R.

S.

T.

V.

W.

Y.

INDEX.

(References are to pages.)

A.

L.

S.

T.